BFOQ Revisited: *Johnson Controls* Halts the Expansion of the Defense to Intentional Sex Discrimination*

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I. INTRODUCTION

The bona fide occupational qualification (BFOQ) is a statutory defense to intentional discrimination under Title VII.[1] The BFOQ defense permits an employer to adopt an otherwise facially discriminatory employment practice if "reasonably necessary to the normal operation of that particular business. . . ."[2] Both the courts and the Equal Employment Opportunity Commission (EEOC) have traditionally interpreted this defense very narrowly. A gender-based employment classification, for example, qualifies as a BFOQ only if the failure to adopt a single-sex policy undermines the employer's ability to accomplish its essential business mission.[3]

A number of recent decisions by the circuit courts of appeal suggest an emerging expansion of the BFOQ exception. These decisions recognize an expanded BFOQ defense in two contexts. First, the courts of appeal for two circuits have upheld BFOQs based upon the apparent psychological or "role modeling" needs of the employer's clientele.[4] Secondly, the courts of appeal for three circuits have reformulated the traditional framework for BFOQ analysis in order to sustain fetal protection policies.[5]

The courts have expanded the traditional scope of the BFOQ defense in both of these settings through an increased deference to the employer's managerial prerogative. This trend has been accompanied by a blurring of the once-distinct line between the BFOQ defense, traditionally applicable in cases of intentional discrimination, and the broader business necessity standard, traditionally utilized only in testing the validity of facially neutral practices that have a discriminatory impact. In pragmatic terms, this enhanced deference suggests a reemergence of a judicial paternalism that bestows special protections but at the price of gender inequality.

This Article explores this expansion of the BFOQ defense. The Article first surveys the origin and traditional scope of the BFOQ defense.[6] It then goes on

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* [Editorial Note: The Supreme Court decided the *Johnson Controls* case just as this article was delivered to the printer. Professor Befort has written an addendum that appears after the main body of the article which summarizes the *Johnson Controls* decision and its likely impact on the scope and future development of the BFOQ defense.]

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988).

2. *Id.* § 2000e-2(e)(1). Most courts and commentators refer to the sections as found in the original Civil Rights Act of 1964. Thus, the BFOQ provision is often referred to as section 703(e)(1).

3. *See* Dothard v. Rawlinson, 433 U.S. 321, 336 (1977); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

4. *See infra* notes 150-212 and accompanying text.

5. *See infra* notes 213-359 and accompanying text.

6. *See infra* notes 9-134 and accompanying text.

to discuss the recent growth of the defense in both the role model and fetal protection contexts.[7] Finally, the Article critiques this trend and concludes that the expansion is not consistent with either the core policy objectives of Title VII or the recent Title VII rulings of the Supreme Court.[8]

II. BFOQ BASICS

A. *Origin of the BFOQ Defense*

Title VII of the Civil Rights Act of 1964 creates a general prohibition against discrimination in employment on the basis of race, color, religion, sex, or national origin.[9] This same statute, however, provides employers with a defense "in those certain instances where religion, sex, or national origin[10] is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise. . . ."[11] By far the most frequently litigated application of the BFOQ defense is with respect to distinctions based on gender.[12]

The legislative history of the BFOQ provision is both sparse and unhelpful.[13] Indeed, the legislative history contains no reference at all to the application of the defense with respect to sex discrimination.[14] This paucity of legis-

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7. *See infra* notes 135-67 (role-model), 204-79 (fetal protection) and accompanying text.

8. *See infra* notes 168-203 (role-model), 280-308 (fetal protection) and accompanying text.

9. Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1988) provides:

(a) Employer practices. It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

10. The statutory BFOQ provision does not apply by its terms to classifications based on race or color. Nonetheless, a "necessity" defense has been recognized on rare occasions where racial characteristics are necessary for successful job performance. *See* Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650 (5th Cir. 1980) (undercover investigator).

11. Section 703(e)(1) of Title VII, 42 U.S.C. § 2000e-2(e)(1) (1988).

12. *See* M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 286 (1988).

A statutory BFOQ defense is also included in the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (1967). For a discussion, *see* Rosenblum, *Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions*, 32 HASTINGS L.J. 1261 (1981); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976); Note, *The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job"*, 85 MICH. L. REV. 330 (1986).

While this article focuses on the BFOQ defense in sex discrimination cases, occasional references to the application of the BFOQ concept in age, religion and national origin cases are included because of the substantial similarity in interpretation. *See, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (age); Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986) (religion).

13. For a discussion of legislative history, *see* W. PEPPER & F. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT (1981); Shaman, *Toward Defining and Abolishing the Bona Fide Occupational Qualification Based on Class Status*, 22 LAB. L.J. 332, 333-35 (1971) ("The Congress' understanding of the BFOQ's relationship to Title VII was both superficial and confusing."); Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027-33 (1977); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791-92 (1965).

14. *See* Note, *supra* note 13, at 792; UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting).

lative guidance is owing, in large measure, to the last minute addition of "sex" as a protected classification under the proposed Civil Rights Act.[15] As a result, legislative history has had little impact on the subsequent interpretation of the BFOQ defense to sex discrimination.[16]

The guidelines adopted by the EEOC in 1965[17] have played a far greater role in shaping the development of the BFOQ defense. The guidelines specifically state "that the [BFOQ] exception as to sex should be interpreted narrowly."[18] The BFOQ defense, according to the guidelines, does not encompass a refusal to hire an employee because of either stereotyped characterizations[19] or the preferences of clients or coworkers.[20] The guidelines expressly recognize the need for a BFOQ in hiring only where "necessary for the purpose of authenticity or genuineness . . . *e.g.* an actor or actress."[21] As discussed below, the courts, at least until recently, have closely adhered to this narrow construction of the BFOQ defense.[22]

The EEOC guidelines, as amended in 1969,[23] were also instrumental in overcoming sex-specific, state protective statutes. These statutes, many of which were enacted at the turn of the century, excluded women from various demanding or hazardous jobs out of a concern for their assumed physical frailties and child-bearing capabilities.[24] The courts have uniformly followed the EEOC guidelines in holding that Title VII's ban on sex discrimination preempts these sex-specific state laws.[25] As one federal court of appeals judge has stated, these protective statutes are now "museum pieces, reminders of wrong turns in the law."[26]

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15. The amendment adding "sex" to the list of prohibited classifications was offered on the floor of the House by an opponent of the bill one day before adoption and with the apparent intent of making the bill unacceptable to most legislators. *See* W. PEPPER & F. KENNEDY, *supra*, note 13, at 17-18; Sirota, *supra* note 13, at 1027; 110 CONG. REC. 2577-84 (1964).

16. *See, e.g.*, Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

17. 29 C.F.R. § 1604.2 (1988). Although the EEOC Guidelines bind only the Commission itself, courts generally accord them considerable deference. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 n.19 (1977); Griggs v. Duke Power, Co., 401 U.S. 424, 433-34 (1971).

18. 29 C.F.R. § 1604.2(a) (1988).

19. *Id.* § 1604.2(a)(1)(ii).

20. *Id.* § 1604.2(a)(1)(iii).

21. *Id.* § 1604.2(a)(2).

22. *See infra* notes 57-134 and accompanying text.

23. 34 Fed. Reg. 13,367-68 (1969) (codified at 29 C.F.R. § 1604.2(b)). The regulation states that state protective laws that conflict with Title VII "will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the [BFOQ] exception."

24. *See* J. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 14-106 (1978). The most frequently cited example of such legislation is the Oregon statute at issue in Muller v. Oregon, 208 U.S. 412 (1908), which limited the number of working hours for women employed in factories and laundries. The Court, in upholding the law, stated:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her . . and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

25. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Vogel v. Trans World Airlines, 346 F. Supp. 805 (W.D. Mo. 1971).

26. UAW v. Johnson Controls, Inc., 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting).

B. *Procedural Context*

1. *Two Theoretical Bases Summarized*

A plaintiff may establish a Title VII violation under either of two theories—disparate treatment or disparate impact. The Supreme Court in *Teamsters v. United States*[27] summarized the distinction between these two theories as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

2. *Burden of Proof*

A case of disparate treatment, then, is established by proof of a facially discriminatory employment practice.[28] A disparate impact violation, on the other hand, is typically made out by statistical proof that illustrates the disproportionate effect of a supposedly neutral employment practice.[29]

Each type of case entails distinct evidentiary frameworks and burden of proof rules.[30] The Supreme Court in *McDonnell Douglas v. Green*,[31] for example, established a three-part stucture for proving a disparate treatment violation. Under that test, the plaintiff must initially establish a prima facie case of discrimination by presenting evidence of a facially discriminatory practice.[32] The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision.[33] If the employer succeeds in meeting this burden, the plaintiff then has the opportunity to prove that the employer's proffered reason was not the true reason but rather a pretext for discrimination.[34]

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27. 431 U.S. 324, 335-36 n.15 (1977).

28. *See, e.g., id.* at 335, n.15; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

29. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

30. The burden of proof rules under Title VII are quite complex. They vary not only as to disparate treatment and disparate impact cases, but also with respect to whether a disparate treatment claim alleges individual or systemic discrimination or is perceived by the court to be a "pretext" or a "mixed motive" case. The Supreme Court has attempted to clarify the respective burden of proof rules in two recent decisions. *See* Wards Cove Packing v. Atonio, 109 S.Ct. 2115 (1989) (disparate impact); Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) (disparate treatment, mixed motive variety). For a discussion of the pertinent burden of proof rules following these two decisions, see Belton, *Causation and Burden-shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359 (1990); Brooks, *The Structure of Individual Disparate Treatment Litigation after* Hopkins, 6 LAB. LAW. 215 (1990).

31. 411 U.S. 792, 802-05 (1973).

32. *Id.* at 802.

33. *Id.* In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981), the Supreme Court explained that the employer's burden is one of producing evidence of a nondiscriminatory reason for its action. The ultimate burden of proof, however, remains with the plaintiff during all three stages.

34. *McDonnell Douglas*, 411 U.S. at 804.

The evidentiary framework of *McDonnell Douglas* has been refined in subsequent decisions to accommodate the various sub-types of disparate treatment litigation, such as "mixed-motive"[35] and "systemic"[36] type cases.

3. *The Role of the BFOQ Defense*

The BFOQ is not a part of the evidentiary framework for establishing the discriminatory nature of an employment practice. It is, instead, an affirmative defense to facially discriminatory conduct that would otherwise violate Title VII. While this answer may be simple, it deserves some elaboration.

The purpose of the *McDonnell Douglas* test is to provide a framework for determining whether the employer engaged in a discriminatory employment practice.[37] This framework assists the court by allocating the respective burdens of proof on this factual issue. Thus, the *McDonnell Douglas* structure helps the court in a disparate treatment case to decide whether the employment decision in question was the result of intentional discrimination or some other, nondiscriminatory reason.

The BFOQ defense serves a very different function. As opposed to assisting the court in determining whether the employer acted discriminatorily, the BFOQ defense provides a justification for practices that *are* discriminatory. The *raison d'etre* of the BFOQ concept is that a policy of overt bias is sometimes "reasonably necessary to the normal operation of that particular business. . . ."[38] An employer asserting a BFOQ defense is, in essence, saying "yes, I discriminate on the basis of gender, but here is the reason why that policy is necessary."[39] As such, the BFOQ defense not only serves a different purpose from the *McDonnell Douglas* test but also arises at a different point in time. The BFOQ, as an affirmative defense to otherwise discriminatory conduct,

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35. A "mixed motive" case differs from a "pretext" case in that the pertinent inquiry is not whether the employer's alleged rationale is true or false. Instead, the focus is on the relative impact of two causal factors that led to the employment decision—one legitimate and the other discriminatory. *See* Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1788-89 (1989).

The employer bears a somewhat higher evidentiary burden in a mixed motive case. The Court in *Price Waterhouse* stated that a plaintiff may establish a prima facie case by showing that gender played a motivating part in an employment decision, even though other nondiscriminatory reasons also may be involved. *Id.* at 1785. Once this prima facie case is established, the employer may avoid a finding of liability only by showing "that it would have made the same decision even if it would not have allowed the illegitimate consideration to play such a role." *Id.* at 1787-88. The Court explained that this showing is in the nature of an affirmative defense as to which the employer bears the burden of persuasion and not just a burden of producing evidence. *Id.* at 1788.

36. Systemic disparate treatment litigation is in the form of a class action that challenges a pattern or practice of an employer. The plaintiff must show that the employer regularly and purposefully treated the class unfavorably. This proof is usually established by statistical evidence. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 431 U.S. 299 (1977).

37. *See* Trans World Airline, Inc. v. Thurston, 469 U.S. 111 (1985); Teamsters v. United States, 431 U.S. 324, 358, n.44 (1977). *See also* Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863 (1989).

38. Section 703(e)(1) of Title VII, 42 U.S.C. § 2000e-2(e)(1) (1988).

39. *See* Norwood v. Dale Maintenance Sys., Inc., 590 F. Supp. 1410, 1415 n.3 (N.D. Ill. 1984) ("In effect, an employer's claim of a bfoq for the position simultaneously admits gender-based discrimination and attempts to justify it.").

comes into play only after the factual issue posed by the *McDonnell Douglas* test has been answered affirmatively.[40]

4. *Business Necessity Distinguished*

The BFOQ defense, properly understood, is distinct from the business necessity concept with which it is sometimes confused.[41] At least until recently,[42] it was well settled that the BFOQ was a defense applicable in cases of disparate treatment while the business necessity standard was applicable only in cases of disparate impact.[43]

This dichotomy is well grounded in the different functions that these two theories perform. As discussed above, a BFOQ is an affirmative defense to overt discrimination that comes into play independent of the *McDonnell Douglas* framework.[44] Business necessity, on the other hand, is an integral part of the evidentiary framework in disparate impact cases.[45] Its role is to dispel the inference of discrimination that arises because of the discriminatory impact of seemingly neutral employment practices.[46] Business necessity, accordingly, assists the court in determining whether conduct is discriminatory in the first place.

These different functional roles result in two significant practical distinctions as well. First, the burden of proof rules differ. As with any affirmative defense,[47] the burden of proving a BFOQ falls on the defendant-employer.[48] The employer's burden with respect to business necessity, however, is only that of a burden of production. The Supreme Court in *Wards Cove Packing v. Atonio*[49] held that the plaintiff bears the ultimate burden of persuasion in establishing a case of disparate impact, including the business justification stage.

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40. In practice, the assertion of a BFOQ defense is usually accompanied by an admission of gender discrimination. In that instance, the *McDonnell Douglas* proof process is bypassed entirely. *See Norwood*, 590 F. Supp. at 1415 n.3; Harden v. Dayton Human Rehabilitation Center, 520 F. Supp. 769 (S.D. Ohio 1981).

41. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 358-60 (2d ed. 1983) [hereinafter SCHLEI & GROSSMAN] ("The courts have not always distinguished carefully between the statutory BFOQ defense and the judicially established defense of business necessity."). *See, e.g.*, Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 441 U.S. 966 (1980) (court applied business necessity standard under the rubric of BFOQ); Saunders v. Hercules, 510 F. Supp. 1137, 1141 (W.D. Va. 1981) (business necessity standard applied in case of gender-based discrimination).

The business necessity standard is summarized in Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

42. *See infra* text accompanying note 284.

43. *See, e.g.*, SCHLEI & GROSSMAN, *supra*, note 41 at 358-60; EEOC v. Rath Packing Co. 787 F.2d 318, 327 n.10 (8th Cir. 1986); Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997 (5th Cir. 1984); Harriss v. Pan American World Airways, 649 F.2d 670, 674 (9th Cir. 1980).

44. *See infra* notes 52-56 and accompanying text.

45. *See* M. PLAYER, *supra* note 12, at 279, 282.

46. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

47. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VA. L. REV. 1205, 1214-15 (1981) (defining and explaining the affirmative defense concept).

48. *See, e.g.*, Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1789 (1989) ("when an employer has asserted that gender is a bona fide occupational qualification . . . we have assumed that it is the employer who must show why it must use gender as a criterion in employment."); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085-86 (8th Cir. 1980); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1349 (D. Del. 1978).

49. 109 S.Ct. 2115, 2126 (1989). Prior to the *Wards Cove* decision, most courts apparently presumed that business necessity was an affirmative defense as to which the employer bore the burden of proof. *See id.* (Stevens, J., dissenting).

Secondly, the BFOQ defense imposes a more demanding obligation on the employer than does business necessity. As a justification for discriminating against all members of a protected class, the BFOQ defense is, of necessity, quite narrow.[50] It is established only when a sex-based distinction is necessary to actual job performance.[51]

The business necessity concept, in contrast, does not automatically exclude members of a class. It operates instead as an analytical device for examining neutral practices that impose a burden on members of a protected class. Accordingly, the focus in the business justification stage of a disparate impact case is on the appropriateness of various job qualifications rather than on the legitimacy of a class-based exclusion. This explains the lower threshold for establishing business necessity. The business necessity requirement is satisfied if an employment practice has a "manifest relationship" to job performance.[52] The Supreme Court in *Wards Cove* explained that:

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification . . . will not suffice. . . . At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster. . . .[53]

Business necessity, accordingly, encompasses considerations beyond a narrow focus on job performance, such as workplace safety,[54] societal concerns for environmental protection,[55] and, to a certain degree, an employer's interest in cost containment.[56] As described in the following section, this is considerably less stringent than the BFOQ defense.

C. *The BFOQ Test*

The courts, with but a few early aberrations,[57] have closely adhered to the EEOC's admonition "that the [BFOQ] exception as to sex should be interpreted narrowly."[58] As Judge Posner has recently stated, a narrow reading is "inevitable" in that a "broad reading would gut the statute."[59]

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50. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex"). *See also* UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting) ("A narrow reading is . . . inevitable.").

51. *See Dothard*, 433 U.S. at 336 (the BFOQ defense requires courts to ask whether the employee's very womanhood or manhood undermines his or her capacity to perform essential job requirements satisfactorily).

52. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

53. *Wards Cove*, 109 S. Ct at 2126.

54. *See* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984).

55. *See* Wright v. Olin Corp., 697 F.2d 1172, 1190 n.26 (4th Cir. 1982).

56. *See* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987). As this article points out, while a cost justification defense is not recognized as a BFOQ (*see* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978)) cost containment considerations frequently play a major role in establishing business necessity in disparate impact cases (*see, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979)).

57. *See* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) (district court upheld practice of banning women from jobs requiring lifting in excess of 35 pounds), *rev'd*, 416 F.2d 711 (7th Cir. 1969). *See also* Note, *supra* note 13, at 778 (argues for a broad, rational basis approach to establishing a BFOQ).

58. 29 C.F.R. § 1604.2(a) (1988).

59. UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, J., dissenting).

While the courts have consistently read the BFOQ exception narrowly, they have had more difficulty in formulating a precise test or definition. The current test has evolved over the past twenty years from various competing definitions to an amalgamated three-part standard.

1. *Evolution of a Standard*

One of the earliest attempts at fashioning a test was by the Court of Appeals for the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*[60] In that case, the employer attempted to defend a policy of excluding women from jobs requiring lifting in excess of thirty pounds as a BFOQ. The court rejected this argument based on what became known as the "all or substantially all" test:

> [T]o rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[61]

Since the employer had failed to produce evidence that "all or substantially all" women were incapable of safely lifting more than thirty pounds, the BFOQ was not established.[62]

The Fifth Circuit used a different formulation two years later in *Diaz v. Pan American World Airways, Inc.*[63] There, the employer argued that being female was a BFOQ for flight attendant positions. The court tested this policy by means of an "essence" standard: "[D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[64] Finding that the primary function of an airline is to transport passengers safely, the court concluded that whatever environmental and cosmetic benefits result from an all-female flight attendant crew is too tangential to the airline's business essence to qualify as a BFOQ.[65]

For a number of years, these two cases were viewed as offering competing versions of the BFOQ test.[66] Some commentators interpreted the *Weeks* test as authorizing a broader reading of the BFOQ exception since it arguably justified a class-based exclusion even though not all members of the class were incapable of performing the requisite job duties.[67] In practice, this broad reading did not occur. Subsequent decisions gave *Weeks* a narrow construction relying on a footnote in *Weeks*[68] suggesting that the "all or substantially all" exclusion is

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60. 408 F.2d 228 (5th Cir. 1969).
61. *Id.* at 235.
62. *Id.*
63. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).
64. *Id.* at 388.
65. *Id.*
66. Other tests were also proposed but without the lasting impact of the *Weeks* and *Diaz* formulations. *See, e.g.*, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (BFOQ must be based on unique sexual characteristics, not merely on characteristics that correlate with a particular sex); Note, *supra* note 13, at 795 (BFOQ should be found if the employer's class-based exclusion is supported by a rational basis).
67. *See, e.g.*, SCHLEI & GROSSMAN, *supra* note 41 at 348; Sirota, *supra* note 13 at 348.
68. 408 F.2d 228, 235 n.5 (5th Cir. 1969).

available only if it is impossible to test for necessary job skills on an individualized basis.[69]

Both the *Weeks* and *Diaz* standards were cited with approval by the Supreme Court in *Dothard v. Rawlinson*.[70] The State of Alabama in that case defended as a BFOQ its policy of hiring only male prison guards in male, maximum-security prisons using dormitory housing. The Court discussed the *Weeks* and *Diaz* tests as two ways in which the BFOQ defense "has been variously formulated."[71] Without explicitly endorsing a specific test, the *Dothard* Court went on to state that "whatever the verbal formulation [the BFOQ defense was] meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[72] Nonetheless, the Court concluded that gender was a BFOQ based upon the unique security concerns presented by the Alabama institutions. The Court explained that the male, maximum-security prisons using dormitory-style housing resulted in a peculiarly inhospitable environment in which women would be subject to attack merely by virtue of their sex. This, in turn, would undermine the ability of women to perform the essential job responsibility of maintaining prison security.[73]

Following *Dothard*, the courts increasingly began to use a test that combined the elements of both the *Weeks* and *Diaz* standards.[74] This unified approach makes sense since the two standards relate to different aspects of the BFOQ exception. The "essence" test is concerned with identifying essential attributes of job performance while the "all or substantially all" test is concerned with whether a class-based exclusion is the only feasible means of identifying those who are incapable of performing these job attributes.[75] A third element has more recently been added in cases raising privacy or security concerns. In those instances, a BFOQ will be sustained, even if the combined *Weeks/Diaz* test is met, only if the defendant also shows that no reasonable alternative exists that will accomplish the employer's business mission with less discriminatory impact.[76]

2. *The Test*

The assertion of a BFOQ will succeed only if the employer establishes all three portions of the current test. Each of these elements is discussed below.

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69. *See, e.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-37 (5th Cir. 1976).

70. 433 U.S. 321, 333 (1977).

71. *Id.* at 333.

72. *Id.* at 333-34.

73. *Id.* at 335-37.

74. *See, e.g.*, Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (age discrimination case); Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 299 (N.D. Tex. 1981). *See generally* Note, *Employment Discrimination—U.S. Employers in Foreign Countries: Is Customer Preference a Bona Fide Occupational Qualification*, 31 U. KAN. L. REV. 183, 194 (1982); M. PLAYER, *supra* note 12 at 281-82.

75. *See Wilson*, 517 F. Supp. at 299.

76. *See, e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994, 1000-02 (5th Cir. 1984) (safety); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1351 (D. Del. 1978) (privacy).

a. *Business Essence*

As established in the *Diaz* case, the employer must prove that members of one sex could not safely or efficiently perform essential job duties. The key requirement here is that the job duties must be *essential* in nature and not merely tangential or peripheral.[77]

Like *Diaz*, many of the decisions focusing on the "business essence" factor have involved airline employees, with the most celebrated case being that of *Wilson v. Southwest Airlines Co.*[78]—the "love airline" case. Southwest was a struggling commuter airline that gained national and international attention in the 1970s for its "love" image. As in *Diaz*, Southwest had a policy of hiring only female employees for customer contact positions such as flight attendants and ticket agents.[79] Southwest, however, went beyond this policy to make the airline a "personification of feminine youth and vitality."[80] Unabashed allusions to love and sex pervaded all aspects of Southwest's operation, including its advertising campaigns.[81]

Southwest attempted to distinguish *Diaz* by asserting that its female-only personnel policy went to the essence of its unique, corporate persona as the "love airline."[82] In *Diaz*, the Fifth Circuit rejected Pan American's BFOQ claim because the airline's customer preference arguments were based on concerns that were merely tangential to the airline's primary function of safely transporting passengers.[83] In *Wilson*, Southwest argued that transporting passengers with "love" *was* its business essence. The female-only hiring policy, the airline contended, was not only necessary to accomplish this business mission, but was crucial to the airline's financial success.[84]

The *Wilson* court soundly rejected Southwest's argument and emphasized three now well-established points that illustrate the restrictive scope of the BFOQ defense. First, sex discrimination cannot be justified by the preferences of customers or coworkers.[85] To allow a BFOQ because of a customer's preference for a female flight attendant or a male salesman would only serve to perpetuate the very prejudices that Title VII was meant to overcome.[86] Secondly, the fact that eradicating discrimination may impose a financial burden does not, in itself, give rise to a BFOQ defense.[87] The financial burden of constructing a new bathroom for female employees or of dropping a "love airline" persona is

77. Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

78. 517 F. Supp. 292 (N.D. Tex. 1981).

79. *Id.* at 295.

80. *Id.* at 294.

81. *Id.* Southwest advertised that "WE'RE SPREADING LOVE ALL OVER TEXAS." Television commercials featured attractive attendants promising in-flight love. On board, attendants in hot pants and high boots served "love bites" and "love potions." *Id.* at n.4.

82. *Id.* at 294, 300.

83. *Diaz*, 442 F.2d at 387-88.

84. *Wilson*, 517 F. Supp. at 300, 303-04.

85. *Id.* at 301-02. *See also* EEOC Guidelines, 29 C.F.R. § 1604.2(a)(1)(iii) (1990); Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983); *Diaz*, 442 F.2d at 389.

86. *See Diaz*, 442 F.2d at 389; Note, *supra* note 74, at 189.

87. *Wilson*, 517 F. Supp. at 303-04.

simply an acceptable and necessary cost of eliminating discrimination.[88] Finally, the *Wilson* court held that the business essence requirement must be interpreted narrowly and specifically. In this regard, the court stated that " '[l]ove' is the manner of job performance, not the job performed," which, for Southwest Airlines, was the transporting of passengers.[89] The court in *Wilson* stressed that there is "no principled limit" to allowing an employer to define its business mission in a self-serving, discriminatory manner that is not narrowly tailored toward furtherance of the essential function of the employer's business.[90]

The business essence element of the BFOQ test is satisfied only if a nondiscriminatory policy would preclude the successful performance of the employer's primary business mission. In *Dothard v. Rawlinson*,[91] for example, the Supreme Court recognized a BFOQ because the employment of women guards in the setting of Alabama's "peculiarly inhospitable" male, maximum-security prisons would undermine the ability of the guards to provide prison security. Similarly, even customer preference may apparently constitute a BFOQ if it is so extreme as to result in a complete impossibility of performance.[92]

b. *"All or Substantially All"*

The second element of the BFOQ test requires an employer to show that "all or substantially all" members of one sex could not adequately perform the essence of the job.[93] The purpose of this prerequisite is to compel employers to make employment decisions on factors other than gender-based stereotypical assumptions.[94] For example, in the *Weeks* decision that first enunciated this standard, the court invalidated a policy that barred women from jobs requiring lifting in excess of thirty pounds because the employer failed to produce evidence that "all or substantially all" women could not accomplish this task.[95] Even if it were established by statistical evidence that fewer women than men could lift thirty pounds, this still would not justify the automatic exclusion of all women applicants as a BFOQ. So long as individual testing for the required job

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88. *See* M. PLAYER, *supra* note 12, at 288; Brodin, *supra* note 56, at 320.

89. *Wilson*, 517 F. Supp. at 302.

90. *Id.* at 304.

91. 433 U.S. 321, 334-36 (1977). On the other hand, the *Dothard* Court noted that a BFOQ would not be established if the only concern was for the safety of the female guards as opposed to the maintenance of prison security. *Id.* at 335.

92. *See* Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (BFOQ found in religious discrimination case where helicopter pilot working for American company in Saudi Arabia and with job responsibility of flying over holy area of Mecca during Moslem pilgrimages was compelled to convert to Islam or suffer punishment of beheading). *But cf.* Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) (multinational company's concern that its South American clients would refuse to deal with female director of international operations does not constitute a BFOQ).

93. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

94. *See* Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1178-79 (1971).

95. *Weeks*, 517 F. Supp. at 235-36.

trait is possible, an employment policy based on gender is not permissible unless gender itself serves as the basis for exclusion.[96] As one court has stated:

> The premise of Title VII . . . is that women are now to be on equal footing with men. The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual capacity.[97]

In addition to stereotypical assumptions about work abilities, Title VII also prohibits employment decisions based upon the perceived special sensitivities of women employees. In *Dothard*, the Supreme Court debunked this sort of "romantic paternalism" as a criterion for job selection.[98] Although the *Dothard* Court found a BFOQ because of security needs, it stressed that a female should not be precluded from a job because of the perception that it is too dangerous for women. The Court stated that "it is the purpose of Title VII to allow the individual woman to make that choice herself."[99]

This element is also a difficult one to meet. The "all or substantially all" standard is satisfied only if gender itself is an absolute bar to job performance or if virtually all members of one sex are unable to perform and testing for individual capabilities is not feasible. As described below, the eye of this needle is generally threaded only in cases involving concerns for bodily privacy[100] or where pregnancy poses unreasonable safety risks to third parties.[101]

c. *Less Discriminatory Alternatives*

Even if these first two elements are satisfied, an employer asserting a BFOQ defense must also show the absence of reasonable alternatives that could accomplish its business mission with a less discriminatory impact. If such an accommodation is possible, the employer may not continue to use the more stringent gender-based exclusion.

The Eleventh Circuit Court of Appeals' decision in *Hardin v. Stynchcomb*[102] illustrates the typical impact of this factor. There, a county sheriff's department had a policy of assigning only male deputies to positions in the male section of the county jail in order to protect inmate privacy. The court stated that this policy could be sustained as a BFOQ only if the department showed that job responsibilities could not be rearranged "in a way that would eliminate the clash between the privacy interests of the inmates and the employment opportunities of female deputy sheriffs."[103] In this particular case, only a

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96. *See* Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); EEOC v. Spokane Products, 534 F. Supp. 518, 523-24 (E.D. Wash. 1982). *See also* Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 301, 414 (1980); Note, *supra* note 94, at 1178-79.

97. *Rosenfeld*, 444 F.2d, at 1225 (citations omitted).

98. *Dothard*, 433 U.S. at 335 (1977).

99. *Id.*

100. *See infra* notes 113-20 and accompanying text.

101. *See infra* notes 131-34 and accompanying text.

102. 691 F.2d 1364 (11th Cir. 1982).

103. *Id.* at 1371 (citations omitted).

minor portion of the deputies' time was spent in intrusive tasks such as conducting strip searches or observing shower facilities. Accordingly, the court invalidated the single-sex policy because the department had failed to show that the use of selective work assignments could not protect inmate privacy without impinging on equal employment opportunity.[104]

The "less discriminatory alternative" element serves to assure that a gender-based employment policy is "reasonably necessary" within the meaning of the statutory BFOQ provision. If a reasonable accommodation is possible, such as by selective work assignments, then a broader policy of gender exclusion is not "reasonably necessary" as a BFOQ. On the other hand, an employer will not be required to restructure the workplace in a manner that will result in an undue hardship. For example, courts have held than an employer need not dispense with a single-sex policy if the only less discriminatory alternative necessitates the hiring of additional staff[105] or the assignment of employees to positions for which they are not qualified or trained.[106]

3. *The Test Applied*

This three-part BFOQ test creates a very narrow exception to Title VII's ban on sex discrimination. The test serves to limit the exception to those rare instances in which gender is essential to job performance. The courts also have applied the test stringently with the result that very few cases, at least until recently, have sustained BFOQs based on gender.

The relatively few BFOQs that have been recognized tend to fall into three categories: authenticity, privacy, and safety.

a. *Authenticity*

The EEOC guidelines recognize sex as a BFOQ in only one context—"[w]here it is necessary for the purpose of authenticity or genuineness . . . e.g. an actor or actress."[107] This type of BFOQ reflects a societal preference for physical modeling by members of the sex depicted even though members of the opposite sex could also perform the task in question.[108] Clearly, authenticity is a narrow basis for a BFOQ. Other likely examples of BFOQs based on "authenticity" are fashion models, undercover detectives, and dating service escorts.[109]

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104. *Id.* at 1373-74. *See also* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086-87 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Reynolds v. Wise, 375 F. Supp 145, 151 (N.D. Tex. 1974).

105. *See* Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1354 (D. Del. 1978).

106. *See* Levin v. Delta Air Lines, Inc., 730 F.2d 994, 1001-02 (5th Cir. 1984).

107. 29 C.F.R. § 1604.2(a)(2) (1990).

108. It is possible for actors and actresses to play opposite sex roles, *e.g.* a male Lady MacBeth or a female Peter Pan. Nonetheless, the attributes of a particular sex are often essential ingredients to the success of physical role modeling, especially in the entertainment industry. "Though Title VII attempts to correct misapprehensions and stereotypes based on sex, it does not attempt to further the proposition that men and women are interchangeable for other, nonemployment purposes." Note, *supra* note 94, at 1181-82.

109. *See* Button v. Rockefeller, 76 Misc. 2d 701, 704-05, 351 N.Y.S. 2d 488, 492 (N.Y. Sup. Ct. 1973) (undercover detective assignments); Note, *supra* note 94, at 1182 (dating service escort).

At some point, of course, the "authenticity" exception collides with the principle that customer preference does not justify a BFOQ. This tension arises most frequently with respect to employment preferences based on sex appeal. As discussed above, a hiring preference for female flight attendants fails as a BFOQ because sex appeal is not the "essence" of an airline's business.[110] Sex appeal, however, may well constitute the essence of a nightclub featuring scantily-clad dancers of either sex.[111] One court, in attempting to fashion a line of demarcation, has stated that a BFOQ should be recognized on the basis of sex appeal only where "vicarious sex entertainment is the primary service provided" and not just a marketing scheme to enhance profits.[112]

b. *Privacy*

A second source of successful BFOQ claims are premised on concerns for bodily privacy. These cases typically involve occupations that entail responsibilities for a clientele whose bodies are sometimes fully or partially unclothed. For example, courts have recognized privacy-based BFOQs for labor and delivery nurses,[113] washroom attendants,[114] and nurse's aide positions at a residential care facility for the elderly.[115]

The principal issue in most of the privacy cases is whether the employer can rearrange job responsibilities in order to minimize the clash between privacy interests and Title VII's prohibition on employment discrimination. If such an accommodation is possible, a blanket policy of excluding members of one sex will not support a BFOQ.[116]

The vast majority of privacy cases arise in either prison or health care settings. While both settings involve similar intrusions on bodily privacy, the results in these two contexts are remarkably dissimilar.

The courts in the prison cases have consistently denied BFOQ status for guard positions at either male or female facilities. These cases typically reject gender-based hiring practices in lieu of the less discriminatory alternative of selectively assigning same-sex guards for the most intrusive job tasks.[117]

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110. *See supra* notes 78-90 and accompanying text.

111. *See, e.g.*, St. Cross v. Playboy Club, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights Appeal Bd. 1971) (female gender is a BFOQ for job as a Playboy bunny).

112. Wilson v. Southwest Airline Co., 517 F. Supp. 292, 301-02 (N.D. Tex. 1981).

113. Backus v. Baptist Medical Center, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982); EEOC v. Mercy Health Center, 29 FEP Cases 159 (W.D. Okla. 1982).

114. Norwood v. Dale Maintenance Sys., Inc., 590 F. Supp. 1410 (N.D. Ill. 1984); Brooks v. ACF Indus., Inc., 537 F. Supp. 1122 (S.D. W.Va. 1982).

115. Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346 (D. Del. 1978).

116. *See, e.g.*, Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982); Forts v. Ward, 621 F.2d 1210, 1217 (2d Cir. 1980).

117. *See, e.g.*, *Hardin*, 691 F.2d, at 1373; *Forts*, 621 F.2d at 1217; Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086-87 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. Tex. 1974).

One commentator has summarized these cases as follows:

> In the prison opinions a consistent rule emerges: an opposite-sex guard cannot be presumptively denied employment. In no prison cases except those addressing the rights of juveniles have the courts held Title VII rights to be inferior to perceived rights of prisoners' privacy. In most cases, the prison administration has been ordered to separate only the *most* invasive tasks and reassign those to same-sex guards.

In contrast, three health care cases,[118] with only a minimal glance toward the possibility of restructuring work assignments, have upheld policies that ban the hiring of male nurses for predominantly female patient care tasks. As one commentator has concluded, "these hospital cases are simply wrong."[119] Admittedly, privacy concerns are based on real distinctions between the sexes and pose a legitimate limit on equality in employment. But the legitimacy ceases unless both female and male privacy concerns are treated similarly. All three of these health care cases involve one-way policies that ban male nurses from caring for female patients but not the converse situation. This is precisely the type of sexual stereotyping and customer preference bases for discrimination that Title VII attempts to eliminate.[120]

c. *Safety*

A BFOQ may also arise because of concerns for safety. Here, the concern is not with the danger posed by a particular job to a prospective employee, but with the extent to which gender may undermine the performance of the job itself.[121]

The most frequent arena in which BFOQs based on safety concerns have been asserted is under the Age Discrimination in Employment Act (ADEA) which contains a BFOQ exception similar to that of Title VII.[122] The courts, for example, have upheld age restrictions under the ADEA for jobs with significant safety responsibilities such as police officers[123] and bus drivers.[124] Some early ADEA cases suggested that the courts should defer broadly to considerations of public safety in making BFOQ determinations.[125] This approach was rejected by the Supreme Court in *Western Airlines, Inc. v. Criswell*,[126] a case in which the Court declined to find an age sixty BFOQ for airline flight engineers. While acknowledging that safety considerations are a legitimate factor,[127] the Court

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Comment, *Privacy as Rationale for the Sex-based BFOQ*, 3 DET. C. L. REV. 865, 893 (1985). The prison cases are also analyzed in Comment, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 IOWA L. REV. 428 (1980).

118. *Backus*, 510 F. Supp. 1191; *Fesel*, 447 F. Supp. 1346; *Mercy Health Center*, 29 FEP Cases 159.

119. Comment, *supra* note 117, at 880. A possible basis for distinguishing the prison and health care cases is that prisoners have a lesser constitutional right to privacy than do hospital patients. *See generally Backus*, 510 F. Supp. at 1193. However, the Comment correctly notes that all three of the health care cases involved private facilities and, accordingly, do not implicate a constitutional right to privacy. Comment, *supra* note 117, at 882.

120. *See* EEOC Guidelines, 29 C.F.R. § 1604.2(a)(1)(ii) and (iii) (1990).

121. *See* Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977); Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1253 (1986) ("the 'safety exception' has been limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job").

122. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988). The ADEA provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." *Id.* § 623(f)(1).

123. *See, e.g.*, EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984).

124. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974).

125. *See, e.g.*, EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980); *Hodgson*, 499 F.2d 859.

126. 472 U.S. 400 (1985).

127. The *Criswell* Court quoted a decision of the Fifth Circuit that articulated a sliding scale standard in safety cases: "The greater the safety factor, measured by the likelihood of harm and the probable severity of that

stated that safety-based BFOQs must pass muster under the same narrow standard as any other BFOQ claim.[128]

Except for the Supreme Court's decision in *Dothard*,[129] which has been strictly limited in precedential terms to the "peculiarly inhospitable" conditions of the Alabama prison system,[130] the only sex discrimination cases under Title VII recognizing a safety BFOQ have involved pregnancy.[131] The courts, in a number of cases, have upheld airline policies grounding pregnant flight attendants.[132] The basis of this BFOQ flows from the fear that passenger safety would be endangered because of the likelihood that pregnant attendants would not perform adequately in emergency situations.[133] The courts have found these policies justified, even though some attendants could continue to perform adequately up to the twentieth week of pregnancy, because of the difficulty of identifying in advance those specific pregnant attendants who would be incapacitated in emergency situations.[134]

III. Recent Expansion of the BFOQ Defense

Five recent decisions of the circuit courts of appeal signal an apparent expansion of the traditionally narrow BFOQ defense. These cases arise in two different contexts. First, two decisions recognize BFOQs based on the psychological or role-modeling needs of the employer's clientele. The other three cases sustain policies that exclude women from certain positions because of fetal protection concerns. The courts in both settings stretch the BFOQ defense to resemble more nearly the broader business necessity standard.

A. *The Role-Model BFOQ*

The theoretical basis for a role-model BFOQ is that a single-sex employment policy is necessary to the success of the employer's business mission because of the psychological needs of the clientele. This defense is asserted most

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harm in case of an accident, the more stringent may be the job qualification designed to ensure safe[ty]." *Criswell*, 472 U.S. at 413, *citing* Usery v. Tamiami Trails Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976).

128. The Court in *Criswell* rejected the employer's contention that the ADEA only requires a rational basis standard for establishing age as a BFOQ. *Criswell*, 472 U.S. at 419-23. Noting the similarities between the ADEA and Title VII, the Court concluded that the narrow BFOQ test used in Title VII cases was also appropriate under the ADEA. *Id.* at 413-18.

129. 433 U.S. 321 (1977).

130. *See* M. Player, *supra* note 12 at 287 and cases cited in n.35.

131. Title VII was amended by the Pregnancy Discrimination Act in 1978 so as to overrule General Electric v. Gilbert, 429 U.S. 125 (1976) and make employment distinctions based on pregnancy per se acts of sex discrimination. 42 U.S.C. § 2000e(k) (1988); *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983). Thus, pregnancy-based policies after the amendment constitute disparate treatment based on sex and must be evaluated in terms of the BFOQ defense as opposed to the business necessity burden of production. *See* Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 Yale L.J. 577, 584 (1986).

132. *See, e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984) (attendants removed from flight duty upon discovery of pregnancy); *Harriss*, 649 F.2d 670 (mandatory leave upon pregnancy); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980) (mandatory leave policy after first thirteen weeks of pregnancy).

133. *See, e.g., Levin*, 730 F.2d at 997.

134. *See id.* at 998.

frequently with respect to positions involved in the training or rehabilitation of minors or vulnerable adults.[135]

A handful of early EEOC[136] and state court opinions hinted at a role-model BFOQ.[137] The federal courts, however, had not been receptive to this attempted justification—at least until recently.

The most frequently litigated setting for attempted role-model BFOQs is with respect to school teachers. In a number of cases, school boards have attempted to justify the termination of single, pregnant teachers on the grounds that they provide an inappropriate, negative role-model for their students. Following the adoption of the Pregnancy Discrimination Act in 1978,[138] distinctions based on pregnancy constitute per se disparate treatment because of sex unless saved by establishing a BFOQ.[139] The courts, however, consistently rejected the negative role model theory as rising to the level of a BFOQ necessary to the success of the school's educational mission.[140]

A federal district court in *Jatczak v. Ochburg*[141] similarly rejected the role-model theory. There, the court held that an employer could not refuse to consider female applicants for a child-care worker position in a sheltered workshop for mentally ill youths. The workshop argued that a male BFOQ was necessary in order to provide an appropriate role model for a predominantly male population. The workshop claimed that a female could not successfully perform the job duties because many of the male patients had "negative experiences with females in positions of authority."[142]

Along the lines of the consumer preference cases,[143] the *Jatczak* court rejected the employer's asserted BFOQ by defining narrowly the "essence" of the employer's business. The court stated that the "essential purpose of the workshop was to teach work skills and appropriate work behavior."[144] Role modeling and counseling functions, on the other hand, were found to be merely ancillary functions.[145] Given this determination, the court analyzed the expert testimony

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135. *See* Sirota, *supra* note 13 at 1069. ("One could argue that when the essence of a business or position is to furnish children with the educational and psychological advantages of exposure to a male [or female] image lacking in their homes, an employer could justify its discrimination on the basis of a psychosexual BFOQ.").

136. *See* EEOC Dec. LA 68-4-538E, 2 Fair. Empl. Prac. Cases (BNA) 537 (1969) (refusing to accept BFOQ favoring a male teacher based on the perceived need for a male image).

137. *See* Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (Cal. Ct. App. 1974) (interpreting state law patterned after Title VII to allow a male BFOQ for the position of chaplain in a youth facility based on privacy, discipline and security grounds); City of Philadelphia v. Pa. Human Relations Comm'n, 7 Pa. Commw. 500, 300 A.2d 97 (Pa. Commw. Ct. 1972) (interpreting federal law to allow a male BFOQ for supervisors in a youth center based on both privacy and emotional grounds).

138. 42 U.S.C. § 2000e(k) (1988).

139. *See supra* note 131.

140. *See, e.g.*, Avery v. Homewood Bd. of Educ., 674 F.2d 337, 341 (5th Cir. 1982), *cert. denied*, 461 U.S. 943; Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611, 617 (5th Cir. 1975), *cert. dismissed*, 425 U.S. 559 (1976); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980). *See also* Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986) (decided on constitutional grounds but with similar reasoning).

141. 540 F. Supp. 698 (E.D. Mich. 1982).

142. *Id.* at 701.

143. *See supra* notes 78-92 and accompanying text.

144. *Jatczak*, 540 F. Supp. at 704.

145. *Id.*

and concluded that the exclusion of female employees was not necessary to further the goal of teaching appropriate work behavior.[146]

The *Jatczak* court's conclusion, as well as its mode of analysis, is consistent with the traditionally narrow interpretation of the BFOQ exception. Two more recent decisions, however, have expanded beyond this traditional approach in recognizing role-model BFOQs.

1. *The Role-Model Cases*

In *Chambers v. Omaha Girls Club, Inc.*,[147] the Eighth Circuit Court of Appeals held that the Omaha Girls Club was justified in discriminating against single, pregnant women. The Club is a private, nonprofit corporation that provides programs designed to assist females between the ages of eight and eighteen, the majority of whom are black, "to maximize their life opportunities."[148]

The plaintiff was a black, single woman employed by the club as an arts and crafts instructor. She was fired from this position for violating the club's "role-model rule" which banned negative role modeling, including single-parent pregnancies.[149]

The court of appeals tested the validity of the role-model rule under both the disparate impact and the disparate treatment theories. The court found that the plaintiff had established a prima facie case of disparate impact because the role-model rule would impact blacks to a greater extent than whites because of the former's higher fertility rate.[150] Nonetheless, the court sustained the rule based on a finding of business necessity. Noting that validation studies based on empirical evidence were not available on this issue, the court relied on two other pieces of evidence in finding that business necessity supported the rule. First, the court pointed to the employer's belief that single, pregnant staff members "would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves" while, in fact, "teenage pregnancy is contrary to [the Club's] purpose and philosophy."[151] Secondly, the court made a passing reference to expert testimony indicating that the role-model rule could be helpful in preventing teenage pregnancy.[152] The *Chambers* court rejected the alternative disparate treatment argument in summary fashion.[153] Citing to an earlier

146. *Id.* at 704-05.

147. 834 F.2d 697 (8th Cir. 1987), *aff'g* 629 F. Supp. 925 (D. Neb. 1986).

148. *Id.* at 698.

149. *Id.* at 699.

150. *Id.* at 701.

151. *Id.* at 701-02.

152. *Id.* at 702.

153. The court's truncated discussion of the disparate treatment claim apparently reflects the trial court's mishandling of this issue. The trial court had concluded that the role-model rule did not establish a case of disparate treatment and, accordingly, never reached the BFOQ issue. *Chambers*, 629 F. Supp. at 947-48.

This determination was clearly in error because it failed to consider the impact of the Pregnancy Discrimination Act amendment to Title VII. This amendment, adopted in 1978, overturned existing case law by providing that distinctions based on pregnancy constitute overt sex discrimination. Thus, a case of disparate treatment was automatically established by virtue of the role-model rule itself. The appellate court glossed over these inadequacies and simply concluded that its finding of business necessity "is persuasive as to the existence of a BFOQ." *Chambers*, 834 F.2d at 704.

Eighth Circuit case that had erroneously described the BFOQ defense in terms of the elements of the business necessity test,[154] the court stated that the two concepts were substantially similar so as to obviate the need for independent analysis of the traditionally stricter BFOQ standard.[155]

The Seventh Circuit also recognized the possibility of a psychologically based BFOQ in *Torres v. Wisconsin Dep't of Health and Social Servs.*[156] The en banc majority opinion in *Torres* reversed a district court decision that had invalidated a personnel policy restricting certain correctional-officer positions at Taycheedah Correctional Institution (TCI), a women's maximum security prison in Wisconsin, to female employees.

The exclusively female guard policy at issue in *Torres* was adopted in 1980 by TCI's new superintendent. Prior to that time, TCI employed both male and female guards but made selective work assignments to protect inmate privacy.[157] At the trial court level, the state defended the policy on three grounds—privacy, security, and rehabilitation. The district court, citing a host of other prison cases denying same-sex BFOQs for guards, rejected all three grounds.[158] With respect to the rehabilitation argument, the trial court stated that the defendants offered only a "theory of rehabilitation" as a justification with "no objective evidence, either from empirical studies or otherwise, displaying the validity of their theory."[159]

The Seventh Circuit agreed with the trial court's rejection of the privacy and security contentions, but reversed on the rehabilitation issue.[160] In doing so, the court gave considerable deference to the employer's business judgment. Articulating the traditional BFOQ test, the Seventh Circuit first attempted to identify the "essence" of TCI's business. The court stressed that the business essence should be defined with particularity[161] and then found that TCI's business essence was not merely that of administering a penal institution but, more precisely, also encompassed the unique mission of operating a women's maximum security facility. Included among the goals of such a facility, the court concluded, was the task of inmate rehabilitation.[162]

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154. *See* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980).

155. *Chambers*, 834 F.2d at 704 (8th Cir. 1987).

156. 859 F.2d 1523 (7th Cir. 1988), *rev'g* 639 F. Supp. 271 (E.D. Wis. 1986), *cert. denied*, 489 U.S. 1017 (1989).

157. *Id.* at 1524-25.

158. *Torres*, 639 F. Supp. at 278-82. Plaintiffs argued at the district court level that the state should not be permitted to assert the security and rehabilitation justifications because only privacy concerns were cited at the time of the policy's adoption. The district court indicated that it did not need to rule on this objection since it found each of these theories to be insufficient to support a BFOQ in any event. *Id.* at 278.

159. *Id.* at 280.

160. *Torres*, 859 F.2d at 1528, 1532-33.

161. *Id.* at 1528. The deferential manner in which the *Torres* court defined TCI's business mission was presaged in a religious discrimination case decided two years earlier. In Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986), the Seventh Circuit sustained a hiring preference for Jesuits for teaching positions in the philosophy department after finding that a "jesuit presence" was important to the successful operation of the university. *Id.* at 353.

162. *Torres*, 859 F.2d at 1529-30.

Having deferred to the state's description of its business mission, the court further deferred with respect to the second prong of the BFOQ test by accepting the state's conclusion that the employment of male guards would undermine its ability to accomplish the goal of rehabilitation. The Eighth Circuit chastised the lower court for apparently requiring the defendants to meet an "unrealistic, and therefore unfair burden" in producing empirical evidence to support the necessity of the BFOQ.[163] The court of appeals, instead, noted the need for innovation in the administration of women's penal institutions and stated that the reasoned judgments of prison administrators are entitled to "substantial weight."[164]

Although the court remanded this second issue to the district court for further consideration,[165] the court left little room for doubt as to the anticipated outcome. The superintendent had made a professional judgment, the court noted, that providing women prisoners with an environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation. She based this decision, in part, on the high percentage of inmates who had been physically and sexually abused by men.[166] Without pointing to any specific testimony, the court also found significant the fact that the exclusion of male guards was considered to be a reasonable approach by some professional penologists.[167]

2. *The Role-Model Expansion Critiqued*

The *Chambers* and *Torres* decisions significantly expand the traditional scope of the BFOQ defense. The *Torres* case makes the BFOQ exception more accessible by adjusting each of the elements of the BFOQ test. The *Chambers* court does much the same by adopting the business necessity standard as a substitute for the BFOQ test.

The *Torres* court lowers the hurdle posed by the business essence element of the BFOQ test by deferring to the employer's own, self-serving assessment of its business mission. The Seventh Circuit's finding that rehabilitation is an essential part of TCI's normal business operations is based on weak, inferential evidence created by the employer itself. The court in *Torres* based this finding on language contained in portions of the Wisconsin Administrative Code.[168] Of the two provisions cited, one only indirectly refers to rehabilitation as a goal of the prison,[169] while the other refers to rehabilitation as a goal of prison rules,

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163. *Id.* at 1532.

164. *Id.*

165. *Id.*

166. *Id.* at 1530.

167. *Id.* at 1532.

168. *Torres*, 859 F.2d at 1530. The text of these provisions is set forth *infra* notes 169-70.

169. One of the provisions the court cites is a statement of purpose for a chapter of the code dealing with prison security. The text of this provision states:

> Pursuant to authority vested in the department of health and social services by ss. 46.03 (6)(b), 53.07 and 227.014(2), Stats., the department adopts this chapter for purposes of establishing security procedures at correctional institutions and establishing guidelines which permit inmates to participate in activities within a secure surrounding that may assist them in a successful reintegration into the community.

WIS. ADMIN. CODE § [HSS] 306.01(1) (1987).

not the prison generally.[170] Moreover, the court in its opinion incorrectly attributes the language of the administrative code provisions to the Wisconsin state legislature[171] when, in fact, the provisions were promulgated by the Department of Health and Social Services,[172] the employer and defendant in this case.

First, the *Torres* court's approach to the essence factor clearly is more passive than the traditional approach discussed above. In cases such as *Wilson v. Southwest Airlines Co.*,[173] the courts have refused to accept the employer's sex-based description of its business mission on face value. The fact that the employer in *Wilson* advertised its company as the "love airline" did not compel the court in that case to accept the airline's discriminatory hiring policy as necessary. Instead, the court in *Wilson* undertook an independent inquiry to determine the company's primary business function.[174] By allowing the employer in *Torres* to create its own definition of normal business operations, the court significantly lessens the burden of justifying a BFOQ and opens the door to the possibility of pretextual bases for facial discrimination.

Second, both the *Chambers* and *Torres* courts effectively alter the evidentiary requirements on the "all or substantially all" element. Both courts explicitly reject the need for employers to substantiate psychological BFOQs by producing objective or empirical evidence.[175] That much is not surprising; cases based on a disparate impact theory have held that validation studies are not always required to sustain employment practices.[176] But these cases go considerably further. Neither court required the employer to justify the necessity of a BFOQ classification by a preponderance of the evidence, expert or otherwise. In *Chambers*, the court barely mentioned the expert testimony in support of the role-model rule—a single sentence stating that the trial court "also relied in part on expert testimony to the effect that the role-model rule could be helpful in preventing teenage pregnancy."[177] This was accompanied by a footnote indicating that the parties' experts were in disagreement on this issue.[178] The principal basis for the court's finding of necessity appears instead to be the employer's good faith belief in the efficacy of the rule.[179]

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170. The second provision cited by the court is contained in a general statement on the applicability and purposes of the prison rules. The text of this provision states:

> The objectives of the disciplinary rules under this chapter [includes] the following . . . The rehabilitation of inmates through the development of their ability to live with others, within the rules.

WIS. ADMIN. CODE § [HSS] 303.01(3)(c) (1987).

171. *See Torres*, 859 F.2d at 1529-30.

172. *See* WIS. ADMIN. CODE §§ [HSS] 303.01(3)(c) and 306.01 (1987).

173. 517 F. Supp. 292 (N.D. Tex. 1981).

174. *See id.* at 302-04.

175. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987); Torres v. Wisconsin Dep't of Health and Social Servs., 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989).

176. *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983).

177. *Chambers*, 834 F.2d at 702.

178. *Id.* at n.14.

179. *See id.* at 701-02. Actually, the *Chambers* court never directly addressed the second element of the BFOQ test at all. Since the court relied on business necessity grounds for establishing a BFOQ, the court never discussed the elements of a separate BFOQ test. *See id.* at 704. Even using this more lenient standard, it is questionable whether the meager evidentiary record is sufficient to meet the usual requisites for establishing business necessity. *See* Note, *Discrimination Law—Impermissible Use of the Business Necessity Defense and the Occupational Qualification*, 12 W. NEW ENG. L. REV 135, 158-59 (1990).

The use of evidence in *Torres* is even more telling. After concluding that empirical evidence in support of the rehabilitation theory was both nonexistent and not required,[180] the court made two points. First, the court stated that the plaintiff's expert testimony was lacking in probative value. It was based on experts who had experience with male, but not female, institutions.[181] Empirical evidence to the effect that the recidivism rate had not diminished under the female guard policy was discounted as lacking "any great relevance."[182] Second, the court went on to say that where empirical studies are not available, it may be appropriate to defer to the employer's best business judgment. Here, the judgment of the prison administrators was entitled to "substantial weight."[183]

In essence, the *Chambers* and *Torres* courts establish a new formulation governing the second BFOQ inquiry. In those instances in which it is difficult to show by objective evidence that a discriminatory policy is reasonably necessary to the normal operation of a business, the factfinder will defer to the judgment of the employer. The burden of producing evidence showing that the discriminatory policy is *not* reasonably necessary then shifts to the plaintiff challenging the discriminatory practice. In *Torres*, for example, the evidence offered by the plaintiffs was insufficient to rebut the employer's business judgment and the BFOQ was allowed.[184]

As the dissenters in both *Chambers*[185] and *Torres*[186] noted, this reformulation alters existing BFOQ law by shifting to the plaintiff the burden of producing evidence of the necessity of a sex-based practice. Admittedly, it is more difficult to amass empirical evidence concerning a BFOQ based on psychological needs than for a BFOQ based on the ability to lift heavy objects. Although this may provide a reason not to require empirical evidence,[187] it does not justify shifting the burden of producing other evidence, most notably expert psychological testimony, away from the party that has adopted an employment practice that excludes members of one sex.

The third element of the BFOQ test, the availability of less discriminatory alternatives, was not so much altered as ignored. Although the dissenting opinion in *Chambers* was "unimpressed" with the Club's reasons for rejecting alternatives short of firing the plaintiff,[188] at least the *Chambers* majority required a consideration of possible alternatives. The court briefly discussed the feasibility

180. *Torres*, 859 F.2d at 1532.

181. *Id.*

182. *Id.* at n.4.

183. *Id.* at 1532.

184. *Id.*

185. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 708 (McMillian, J., dissenting) ("Neither an employer's sincere belief, without more . . . that a discriminatory employment practice is related and necessary to the accomplishments of the employer's goals is sufficient to establish a BFOQ or business necessity defense. The fact that the goals are laudable and sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals.").

186. *Torres*, 859 F.2d at 1533 (Cudahy, J., dissenting) ("[t]he *employer* must establish the necessity of a BFOQ in order to avoid Title VII's strictures against employment discrimination. For this case that rule means that the burden of bridging the yawning gaps in our understanding of rehabilitation falls on the state, not the plaintiffs.") (emphasis in original).

187. *See id.* at 1534.

188. *Chambers*, 834 F.2d at 708 (McMillian, J., dissenting).

of alternative practices, such as a leave of absence or a transfer to a noncontact position, but upheld the district court's determination that these were unworkable.[189]

In *Torres*, the less discriminatory alternative factor was not even mentioned. This is surprising since the vast majority of prison guard cases following *Dothard* have turned on the availability of less discriminatory alternatives.[190] These cases consistently have invalidated policies excluding opposite sex guards where selective work assignments could be used to accommodate the respective interests at stake.[191] As Judge Easterbrook emphasized in dissent, the TCI guard policy stands as an anomaly in both practice and legality.[192] Yet, the *Torres* majority never discussed whether the rehabilitation goal could be served by any means short of a blanket ban on male prison guards.

Added to these adjustments in the BFOQ test is the *Chambers* court's failure to apply the BFOQ test at all. The Eighth Circuit in *Chambers* decided that the business necessity and BFOQ concepts were so similar that no independent BFOQ inquiry was necessary.[193] Having found that business necessity dispelled the disparate impact of the role-model rule, the court simply concluded that a BFOQ also must exist to defeat the plaintiff's disparate treatment claim.[194] As discussed in the context of the fetal-protection-policy cases in the following section, equating the BFOQ defense with the traditionally broader business necessity concept is inappropriate.[195] Nonetheless, the *Torres* court accomplishes much the same result by recasting the BFOQ test in a much broader fashion.

Although arising in a somewhat different context, the Supreme Court has cautioned against the use of a role-model theory to justify discriminatory employment practices. In *Wygant v. Jackson Board of Education*,[196] the Supreme Court struck down on equal protection grounds[197] a collective bargaining agreement provision that gave a preference to minority public school teachers in making layoffs. The lower courts had upheld the affirmative action policy on the grounds that the school board had a legitimate interest in providing minority role models in an attempt to alleviate the impact of societal discrimination.[198]

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189. *Chambers*, 834 F.2d at 702-03.

190. *See supra* note 117 and accompanying text.

191. *Id.*

192. *See Torres*, 859 F.2d at 1536 (7th Cir. 1988) (Easterbrook, J., dissenting). ("Women's prisons throughout the nation employ male guards; other women's prisons in Wisconsin do so; four other courts of appeals have held that unless prisons entail grave risks of violence to members of one sex only, as in *Dothard*, sex is not a bona fide occupational qualification for the position of prison guard" [citations omitted]).

193. *See Chambers*, 834 F.2d at 704.

194. *Id.* at 704-05.

195. *See infra* notes 280-308 and accompanying text.

196. 476 U.S. 267 (1986).

197. Arising in the public sector, the plaintiffs' claim of discrimination in *Wygant* was based on constitutional grounds rather than Title VII. *Wygant*, 476 U.S. at 273. The equal protection grounds asserted by the plaintiffs impose an even more stringent proscription against discrimination than does Title VII. As the *Wygant* Court stated, an employment preference based on racial considerations will be sustained under the equal protection clause only if "justified by compelling governmental interest." *Wygant*, 476 U.S. at 274. *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967).

198. *Wygant*, 476 U.S. at 274. One of the negative impacts of societal discrimination, the district court noted, was the fact that the percentage of minority teachers in the Jackson school system was less than the percentage of minority students. *Id.*

The Supreme Court rejected this role-model theory, which was not accompanied by any showing of actual past discrimination by the school board, as "too amorphous a basis for imposing a racially classified remedy."[199] The Court explained that "the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."[200]

The Supreme Court's admonition in *Wygant* is relevant in the BFOQ context. As in *Wygant*, acceptance of a role-model BFOQ has the effect of legalizing otherwise discriminatory conduct. The role-model theory utilized in *Chambers* and *Torres* is similarly "amorphous" in that both courts recognize the inability to substantiate the need for these psychologically-based employment policies by empirical or other objective evidence.[201] More significantly, the role model BFOQ also has "no logical stopping point" if an employer can adopt such a policy without either establishing a need for excluding members of the opposite sex or undertaking a serious consideration of less discriminatory alternatives.

The point is not that the specific holdings in either *Chambers* or *Torres* are necessarily wrong. It may well be that the exclusion of single, pregnant instructors is necessary to the successful operations of the Omaha Girl's Club. It may also be, although less likely, that the exclusion of all male guards from Taycheedah Correctional Institute is necessary to further the rehabilitation of the female inmates.[202] The point is really this—the *Chambers* and *Torres* decisions have significantly expanded the perimeter of the BFOQ test to the point that it may now be possible to establish a BFOQ defense even though not "reasonably necessary to the normal operation of that particular business."

3. *A Proposal*

The role-model cases are difficult, and the principal problem is one of proof. An employer's claim of a BFOQ because of the psychological needs of its clientele is clearly less susceptible of objective proof than a BFOQ based on physical or safety concerns. Nonetheless, the *Chambers* and *Torres* courts take a wrong turn in responding to the problem by simply deferring to the employer's business judgment. Title VII's ban on sex discrimination requires that a role-model exception be substantiated as "reasonably necessary." Rather than

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199. *Id.* at 276.

200. *Id.* at 275.

201. *See supra* notes 175-87 and accompanying text.

202. One commentator maintains that the result in *Torres* was appropriate as a means of redressing gender inequality. *See* Note, *Title VII—Bona Fide Occupational Defense—Necessity of Sex Discriminatory Policy Should be Evaluated According to a Totality of the Circumstances Test*, 102 HARV. L. REV. 2048 (1989). The author acknowledges that *Torres* "expanded the discretion of employers to implement gender discriminatory policies [while] fail[ing] to establish safeguards to ensure that such policies will promote legitimate goals." *Id.* at 2051. The note suggests that gender-based policies are appropriate where necessary to rectify the sexual domination of women, but not to uphold policies that merely exclude women. *Id.* at 2053. Even under this standard, however, the *Torres* court failed to require an evidentiary basis for concluding that the exclusion of male guards was necessary to redress sexual inequality.

abdicating their responsibilities, the courts should test a role model BFOQ by the same standard used in other cases, but adjusted by some fine tuning for the difficulty of proof.

First, the courts should ascertain whether psychological role modeling goes to the essence of the employer's business. In making this determination, some deference is due the employer. It is, after all, the employer's business. But the courts should not follow *Torres* in automatically deferring to the employer's characterization of its business mission. The employer, instead, should be required to produce evidence establishing that psychological role modeling goes to the core of its business, and the plaintiff should have the opportunity to rebut this showing. Most importantly, the courts should weigh this evidence on an independent basis.

Second, the employer must establish that the exclusion of one sex is necessary to accomplish the psychological business objective. Because of the relative difficulty of proof, objective evidence should not be required. The employer, however, should be required to support its policy by the best evidence available—usually expert psychological testimony.[203] And the burden of proof on this issue should be on the party attempting to justify the sex-based practice.

Finally, the employer also should bear the burden of proving the absence of less discriminatory alternatives. This is likely to be the most significant issue in many psychological cases because it is one issue on which tangible, nonexpert evidence is likely to be possible. Unlike in *Chambers* and *Torres*, the courts should make this a real, rather than a perfunctory, inquiry.

This proposed framework more appropriately balances the respective concerns of the parties. The difficulty of proof problem is ameliorated by providing some deference to the employer's description of its business mission and by dispensing with the requirement of objective proof. At the same time, the BFOQ defense is narrowly limited to ensure that a psychological justification for an otherwise discriminatory policy will only be permitted when "reasonably necessary."

B. *Fetal Protection and the Rise of Business Necessity*

The second line of BFOQ expansion has occurred in cases addressing the validity of fetal protection policies. Three courts of appeals have held that fetal protection policies may constitute a valid basis for excluding female employees from the workplace. These fetal protection decisions are a new twist on the previously recognized safety grounds for a BFOQ.

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203. This proposal is consistent with the guidelines contained in the EEOC Compliance Manual for establishing a "same-sex role model" BFOQ. To substantiate such a BFOQ, the Manual requires

> medical evidence from the employer that the employer's clients have psychological need for a same-sex role model. This evidence is the main element in the same-sex role model investigation and must be in the form of a written statement or affidavit provided by a doctor, psychiatrist, or psychologist.

EEOC Compl. Man. (BNA) § 625.8(a)(2), at 625:0017 (April 1982).

The Supreme Court's *Dothard*[204] decision established the ground rules for a safety-based BFOQ. In that case, the Court upheld a BFOQ for male prison guards in Alabama's "peculiarly inhospitable" maximum security prison for men. The Court was not concerned with the danger facing the individual prison guard. The Court stressed that Title VII does not permit an employer to presume that a job is too dangerous for women. The issue of personal danger is a choice left to the individual employee or applicant.[205] The *Dothard* Court was concerned, instead, with whether the presence of female guards would undermine the ability to carry out the essential task of maintaining prison security.[206] The lesson of *Dothard* is that a BFOQ based on safety grounds is appropriate only where the exclusion of one sex is necessary to accomplish the performance of the employer's primary business function.[207]

Subsequent cases have strictly limited the results in *Dothard* to the particular facts of Alabama's dormitory-style prison setting.[208] No reported decision since *Dothard* has sustained a BFOQ for prison guards on safety grounds. In fact, the *Torres*[209] decision is the only case since *Dothard* to recognize a BFOQ for prison guards on any basis whatsoever.

The only post-*Dothard* cases recognizing a BFOQ because of safety have involved concerns related to pregnancy. These cases fall into two categories. The first category is similar to *Dothard* in that the safety concern focuses on the ability to carry out essential job functions. For example, a number of cases have recognized BFOQ's for nonpregnant flight attendants because of the fear that pregnancy would interfere with the attendants' ability to carry out passenger safety functions in emergency situations.[210] Like *Dothard*, this fear goes to the core of an employee's capability of performing an essential job function: the safe transportation of airline passengers. The principal issues posed in these cases are whether BFOQ exclusions can be avoided either by individual testing[211] or by the adoption of less discriminatory alternatives.[212] Thus, this first line of cases closely follow the traditional limits of the BFOQ test.

The second line of cases is very different. Here, the focus is not on job performance but on the potential for harm to an employee's fetus or offspring. Three recent courts of appeals decisions have held that the exclusion of fertile women from the workplace may be justified in situations where employment may pose a danger to fetal health. These decisions represent a potentially large

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204. Dothard v. Rawlinson, 433 U.S. 321 (1977). The *Dothard* decision is discussed in more detail *supra* notes 70-73 and accompanying text.

205. *Id.* at 335.

206. *Id.* at 336.

207. *See* Becker, *supra* note 121, at 1253 ("the 'safety exception' has been limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job").

208. *See* M. PLAYER, *supra* note 12 at 287.

209. Torres v. Wis. Dep't. of Health and Social Servs., 859 F.2d 1523 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1133 (1989).

210. *See, e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984); Harriss v. Pan Am World Airways, Inc., 649 F.2d 670 (9th Cir. 1980); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980).

211. *See, e.g.*, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 372 (1980) (majority opinion concluding that maternity leave issue cannot be determined on an individual basis, but dissenting opinion would require individual evaluation of ability to perform. *Id.* at 374 (Butzner, J., dissenting)).

212. *See, e.g.*, *Levin*, 730 F.2d at 999-1002.

departure from traditional BFOQ principles in that they reject the need for BFOQ analysis in favor of the broader business necessity theory in testing the validity of facially discriminatory employment practices.

1. *The Fetal Protection Cases*

In *Wright v. Olin Corp.*,[213] the Fourth Circuit Court of Appeals considered the validity of a fetal protection policy that excluded fertile women from jobs requiring exposure to potentially harmful chemicals. The *Wright* court confronted a dilemma similar to that of the Eighth Circuit in *Chambers*—the lower court decision was obviously in error but the appeals court was sympathetic to the result. The district court decision in *Wright* had upheld Olin's policy, finding that it was not adopted with a discriminatory purpose, but without considering whether the policy was facially discriminatory or had a discriminatory impact. The court never reached the BFOQ issue.[214] Unfortunately, the Fourth Circuit emulated the *Chambers* court and retained the result by compounding the error.

The *Wright* court had considerable difficulty in determining the appropriate conceptual framework for its analysis. The problem centered around whether the plaintiff's claim was grounded in a disparate treatment or a disparate impact theory, the court noting that fetal protection policies do not fit neatly into either of these categories.[215] Prior to the adoption of the Pregnancy Discrimination Act (PDA) of 1978,[216] the Supreme Court had ruled that employment practices based on pregnancy were not facially discriminatory and could only be challenged under a disparate impact theory.[217] The PDA altered this result four years prior to the *Wright* decision by amending Title VII to provide that pregnancy-based distinctions constitute per se acts of sex discrimination.[218] The *Wright* court, however, failed to discuss the PDA and relied on the pre-amendment line of cases to conclude that the fetal protection policy should be analyzed under a disparate impact/business necessity approach.[219]

The court in *Wright* apparently knew that its disparate impact conclusion was on shaky grounds and attempted to fashion an alternative basis for avoiding the narrow strictures of the BFOQ defense. The court acknowledged that the facial neutrality of Olin's policy "might be subject to logical dispute," but dismissed that concern as "semantic quibbling."[220] The court emphasized that the Title VII theories were not "intended to operate with rigid precision."[221] Al-

213. 697 F.2d 1172 (4th Cir. 1982).

214. *Id.* at 1182-84.

215. *Id.* at 1184.

216. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978).

217. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

218. 42 U.S.C. § 2000e(k) (1988). *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (stating that the amendment "has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."). *See also supra* note 131.

219. *Wright*, 697 F.2d at 1186.

220. *Id.*

221. *Id.* at 1184.

though the generally accepted notion that the BFOQ is the appropriate defense to excuse otherwise overt discrimination is "properly descriptive of a paradigmatic litigation pattern, it is not an accurate statement of any inherent constraints in Title VII doctrine."[222] The real appropriate defense, the court explained in a footnote, is a matter of litigation choice:

> In this case, where the defendant-employer has not attempted to present a classic b.f.o.q. defense, it may not properly be forced to do so. We therefore reject claimant's suggestion that because the claim of violation here is arguably one of "overt" discrimination, the employer is confined to a b.f.o.q. defense that obviously cannot be established and indeed is not advanced. Instead defendant is entitled to have considered—though not necessarily to have accepted—the defense actually advanced under the wider scope of the business necessity theory.[223]

Thus, according to the *Wright* court, the employer must be entitled to assert a business necessity defense, regardless of the nature of the plaintiff's claim, because otherwise it would lose.

Applying the disparate impact/business necessity approach, the court first held that the fetal vulnerability program constituted a prima facie case of sex discrimination.[224] The court then attempted to adapt the traditional business necessity defense to fetal protection programs. As a threshold question, the court considered whether the protection of workers' unborn children could properly be considered a "necessity."[225] The court noted that protecting the safety of workers' unborn children conceptually lies somewhere between protecting the safety of the workers themselves and protecting the safety of customers exposed to workplace hazards.[226] The court concluded that the safety of unborn children is sufficiently analogous to the safety of customers to qualify potentially as a business necessity[227] and remanded the business necessity issue to the district court for further proceedings.

As a guide to the district court, the *Wright* court outlined its idea of the appropriate analysis to be followed in fetal protection cases. The court first stated that an employer must prove that significant risks of harm to unborn children make necessary the exclusion of women, and not men, from hazardous work areas.[228] The employer must establish the significance and extent of the risk as well as the necessity of the program by independent, objective evidence, including expert opinion evidence.[229] The business necessity defense is prima facie established at this point.[230] A plaintiff, however, may rebut the business need by showing the availability of less discriminatory means of achieving the employer's desired goal.[231]

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222. *Id.* at 1186, n.21.

223. *Id.* The *Wright* court does not explain why a defendant would ever choose to rely on a narrow BFOQ defense rather than a broad business necessity defense.

224. *Id.* at 1187.

225. *Id.* at 1188.

226. *Id.* at 1189.

227. *Id.*

228. *Id.* at 1190.

229. *Id.*

230. *Id.* at 1191.

231. *Id.*

Two years later, the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital* considered the validity of a hospital's fetal protection policy which resulted in the firing of a pregnant x-ray technician.[232] The hospital-employer discharged the technician "to protect the pregnant employee's fetus from potentially harmful radiation and to protect the hospital's finances from potential litigation."[233]

The Eleventh Circuit adopted a somewhat different approach than did the *Wright* court. As an initial point of departure, the *Hayes* court acknowledged that the adoption of the PDA requires that the disparate treatment theory must be considered in evaluating fetal protection policies.[234] The Eleventh Circuit nonetheless borrowed heavily from *Wright* in constructing its own analytical framework.[235]

The *Hayes* court began by establishing a presumption that if an employer's policy applies only to pregnant women, it is facially discriminatory and subject to scrutiny under a disparate treatment/BFOQ analysis.[236] In spite of the PDA, the *Hayes* court permitted an employer to rebut this presumption by showing that the policy is neutral in the sense that it "effectively and equally protects the offspring of all employees."[237] Specifically, the employer must show (1) that there is a substantial risk of harm to the fetus from the woman's exposure to workplace hazards, and (2) that the hazard applies only to women and not to men.[238] In both cases, scientific evidence is necessary.[239]

If the employer demonstrates the existence of these two factors, the *Hayes* court considers the policy facially neutral and a disparate impact/business necessity standard applies.[240] If the employer fails to overcome the burden of showing that its policy is not facially discriminatory, the plaintiff's disparate treatment claim prevails unless the employer establishes a BFOQ defense.[241] The court explained, consistent with traditional BFOQ principles, that a BFOQ exists only if the employer can show a direct relationship between the policy and the ability of pregnant or fertile women to perform the job.[242]

Applying this mode of analysis to the instant case, the court concluded that the hospital failed to demonstrate that the level of radiation exposure presented an unreasonable risk of harm to the fetus.[243] Thus, the hospital did not rebut the presumption of facial discrimination and a disparate treatment violation was established.[244] No BFOQ defense was available since the hospital failed to prove that the employee's pregnancy would somehow affect her job performance.[245]

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232. 726 F.2d 1543 (11th Cir. 1984).
233. *Id.* at 1546.
234. *Id.* at 1547-48.
235. *See id.* at 1548, n.8.
236. *Id.* at 1548.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 1552.
241. *Id.* at 1549.
242. *Id.*
243. *Id.* at 1550-51.
244. *Id.* at 1551-52.
245. *Id.*

Although it concluded that the facts were sufficient to sustain a finding of facial discrimination, the court, to "be completely fair to the Hospital," also analyzed the policy under a disparate impact theory.[246] Pursuant to the court's analytical model, the business necessity defense is automatically established by the same factors that rebut the presumption of facial discrimination.[247] The burden then shifts to the employee to show the existence of "acceptable alternative policies that would have a lesser impact on the affected sex."[248] The *Hayes* court concluded that the hospital would also lose under this theory because it failed to consider less discriminatory alternatives to firing the pregnant technician.[249]

Interestingly, neither of these first two cases actually sustained a fetal protection policy.[250] The *Wright* court remanded the issue of business necessity to the lower court while the Eleventh Circuit in *Hayes* found the hospital's policy unlawful. The only court of appeals decision that has upheld a fetal protection policy under Title VII is the Seventh Circuit's decision in *UAW v. Johnson Controls, Inc.*,[251] which one of the dissenting judges described as "likely the most important sex-discrimination case in any court since . . . Congress enacted Title VII."[252]

In 1982, Johnson Controls, a manufacturer of batteries, adopted a fetal protection policy designed to protect unborn children and their mothers from harmful lead exposure.[253] The policy excludes women of presumed childbearing age from jobs in which lead levels are considered excessive.[254] Johnson Controls maintained that this policy was necessary because the previous voluntary policy failed to adequately protect pregnant women and their unborn children.[255]

The Seventh Circuit considered the validity of Johnson Controls' policy in the procedural context of reviewing the district court's grant of Johnson Controls' summary judgment motion which upheld the policy on the merits.[256] The Seventh Circuit affirmed in a 7-4 en banc decision.[257]

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246. *See id.* at 1552-54.

247. *Id.* at 1553. While the *Hayes* court found that the hospital's desire to protect the health of employee offspring established a business necessity, it rejected the hospital's alternative contention that potential litigation costs can provide the basis for a business necessity defense. *Id.* n.15. The court stated that potential liability is "too contingent and too broad a factor to amount to a 'business necessity.'" *Id.*

248. *Id.* at 1554.

249. *Id.* at 1553-54.

250. The Fifth Circuit also invalidated a pre-PDA fetal protection policy relied on to support the firing of a pregnant x-ray technician on the grounds that the employer-hospital had failed to use available, less discriminatory alternatives to discharge. *See* Zuniga v. Kleberg County Hospital, 692 F.2d 986, 992 (5th Cir. 1982).

251. 886 F.2d 871 (7th Cir. 1989), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215). *See also* Comment, *Title VII—Equal Employment Opportunity—Seventh Circuit Upholds Employer's Fetal Protection Plan*, 103 HARV. L. REV. 977 (1990) (discussing the *Johnson Controls* decision).

252. *Johnson Controls*, 886 F.2d at 920 (Easterbrook, J., dissenting).

253. *Id.* at 874.

254. *Id.* at 876. The policy presumes that any woman under age 70 is fertile, *see id.* at 907 (Posner, J., dissenting), but does not apply to those females who provide medical confirmation of their inability to bear children, *id.* at 877-78.

255. *Id.* at 878.

256. *See* UAW v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988).

257. UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215).

The *Johnson Controls* court followed the lead of *Wright* and *Hayes* in adopting a business necessity framework for testing the validity of fetal protection policies.[258] Although apparently acknowledging that such a policy constitutes facial discrimination normally justifiable only by a BFOQ defense,[259] the court stressed the "necessity of avoiding rigid application of proof patterns to particular factual situations."[260] After reviewing the *Wright* and *Hayes* decisions, as well as an EEOC Policy Statement[261] summarizing these two decisions, the *Johnson Controls* court formulated a three-part test for establishing the business necessity defense. Under this approach, a fetal protection policy will survive a Title VII challenge if (1) there is a substantial health risk to the unborn child; (2) the transmission occurs only through women; and (3) no equally effective, less discriminatory alternatives are available to the employer.[262]

The court also discussed the burden of proof allocation rules outlined for disparate impact cases in the Supreme Court's *Wards Cove* decision.[263] In *Wards Cove*, the Court held that while an employer carries the burden of producing evidence of a business justification, the burden of persuasion on this issue remains with the plaintiff.[264] The *Johnson Controls* court adopted this approach as well. Accordingly, the question posed by the *Johnson Controls* court, given the summary judgment posture, was whether the plaintiffs presented sufficient evidence to demonstrate that the business necessity defense must fail.[265]

In applying this analytical framework, the court first stated that both parties were in agreement that the record contained adequate evidence concerning the existence of substantial health risks to the unborn child.[266] The court then went on to conclude that the plaintiffs had failed to show that the risk of transmission is not confined to women and that there are less discriminatory alternatives available.[267] Since the plaintiffs had not met their burden of proof on the business necessity issue, the Seventh Circuit affirmed the lower court's grant of summary judgment.[268]

The court also determined that Johnson's policy could be upheld even under a more narrow BFOQ analysis.[269] The Seventh Circuit relied heavily on its earlier *Torres*[270] decision in reaching this conclusion. As in *Torres*, the *Johnson Controls* court defined the employer's business essence with particularity and concluded that Johnson Controls' concern for industrial safety was part of

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258. *Id.* at 886.

259. *Id.*

260. *Id.* at 883.

261. EEOC Policy Statement on Reproductive and Fetal Hazards Under Title VII, Fair Empl. Prac. Man. (BNA) 401:6013 (Oct. 3, 1988).

262. *Johnson Controls*, 886 F.2d at 885.

263. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). The *Wards Cove* decision is discussed *supra* at notes 49-53 and accompanying text.

264. *See id.* at 2126.

265. *Johnson Controls*, 886 F.2d at 888.

266. *Id.*

267. *Id.* at 889-91.

268. *Id.* at 893.

269. *Id.*

270. The *Torres* decision is discussed *supra* notes 156-67 and accompanying text.

the "essence" of the company's battery manufacturing business.[271] The court also followed *Torres* in providing considerable deference to the employer's business judgment and finding that Johnson Controls' policy was reasonably necessary to furthering the industrial safety objective.[272]

Four dissenting judges filed three separate opinions. All agreed that Johnson Controls' fetal protection policy constituted disparate treatment which may be excused only by the employer's proof of a BFOQ.[273] One dissenting judge denounced the substitution of a business necessity standard as simply "result[s]-oriented gimmickry."[274]

The dissenters disagreed, however, as to the proper scope of the BFOQ defense as applied in a fetal protection case. Judge Easterbrook argued for the traditional, narrow construction. Applying this approach, he concluded that the Johnson Controls policy could not satisfy the BFOQ standard because the employer's concern for fetal health is unrelated to the normal operation of the battery manufacturing business and because not all or substantially all women employees will become pregnant.[275] Noting that Johnson Controls' policy was more stringent than that required by OSHA, Judge Easterbrook also concluded that the lower court's grant of summary judgment in favor of the employer was inappropriate even under a business necessity analysis.[276]

Judge Posner also contended that it was a mistake to decide such important policy issues in the context of a summary judgment motion.[277] While agreeing with Judge Easterbrook that a discriminatory treatment/BFOQ analysis was required, Judge Posner argued for a more expansive interpretation of the BFOQ defense. He maintained that the "normal operation" of a business, within the meaning of the BFOQ defense, "encompasses ethical, legal and business concerns about the effects of an employer's activities on third parties," including the impact of exposing employee offspring to excessive amounts of lead.[278] Judge Posner would remand this case for a full-blown trial to address a "host of unanswered questions" such as the feasibility of alternative practices, the potential hazard posed to the fetus by paternal lead exposure, and the financial impact of potential litigation.[279]

2. *The Fetal Protection Policy Expansion Critiqued*

The expansion accomplished by the fetal protection cases is more similar to that in *Chambers* than in *Torres*. In the *Torres* decision,[280] the Eighth Circuit utilized the elements of the traditional BFOQ test but adjusted them to increase

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271. *Johnson Controls*, 886 F.2d at 896.

272. *Id.* at 896-98.

273. *Id.* at 902 (Cudahy, J., dissenting), 904 (Posner, J., dissenting), and 908 (Easterbrook, J., dissenting).

274. *Id.* at 902 (Cudahy, J., dissenting).

275. *Id.* at 912-15 (Easterbrook, J., dissenting) (Judge Flaum joined in Judge Easterbrook's dissent).

276. *Id.* at 915-20.

277. *Id.* at 902 (Posner, J., dissenting).

278. *Id.* at 904-06. Judge Cudahy, in a separate opinion, notes his agreement with Judge Posner's more expansive approach. *Id.* at 901 n.1 (Cudahy, J., dissenting).

279. *Id.* at 906-07.

280. The *Torres* decision is discussed *supra* notes 156-67 and accompanying text.

the scope of judicial deference to managerial decision-making. The fetal protection cases, in contrast, reject the BFOQ test entirely and substitute the broader business necessity standard. This approach is similar to *Chambers* but with one important distinction. The rejection of the BFOQ test in *Chambers* was apparently a mistake.[281] In the fetal protection cases, the choice was very deliberate.

The business necessity standard used in the fetal protection cases is clearly broader than the traditional BFOQ test. While the latter defense is usually limited to ascertaining gender attributes that preclude effective job performance, the business necessity concept encompasses broader concerns including workplace safety.[282] In fact, the *Wright* court, in adopting a business necessity approach, expressly stated that the fetal protection policy at issue could not stand if tested under a BFOQ standard.[283]

The substitution of a business necessity standard for the traditional BFOQ test in disparate treatment cases is not only contrary to longstanding precedent, but also is inappropriate as a matter of policy. Until *Wright*, it was universally accepted that disparate treatment cases required a BFOQ justification while the business necessity standard was applicable only in cases of disparate impact.[284]

This distinction flows naturally from the origin of the two concepts. The BFOQ defense is statutory in nature and part of Title VII as originally enacted.[285] By its terms, the defense justifies overt discrimination on the basis of religion, sex or national origin when "reasonably necessary to the normal operation of that particular business."[286] Business necessity, on the other hand, is a judicially-created concept. Its origin in the seminal Supreme Court case of *Griggs v. Duke Power Co.*[287] is in the very same paragraph that gave birth to the notion of a Title VII cause of action grounded in disparate impact: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity.* If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[288]

More significantly, these two theories perform very different functions. A BFOQ is an affirmative defense to conduct that is overtly discriminatory. It is not part of the *McDonnell Douglas* framework for proving discrimination.[289] A BFOQ defense comes into play only after conduct has already been proven or admitted to be discriminatory. The function of the BFOQ defense, then, is to permit an employer to adopt a sex-based policy that would otherwise be illegal.

Business necessity, in contrast, is not really a defense at all, but part of the evidentiary framework for proving a case of disparate impact.[290] While the

281. *See supra* notes 153-55 and accompanying text.
282. *See supra* notes 41-56 and accompanying text.
283. Wright v. Olin Corp., 697 F.2d 1172, 1185 n.21 (1982).
284. *See supra* note 43 and accompanying text.
285. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 703(e), 78 Stat. 241 (1964).
286. 42 U.S.C. § 2000e-2(e)(1) (1988).
287. 401 U.S. 424, 431 (1971).
288. *Id.* (emphasis added).
289. The *McDonnell Douglas* framework for proving discrimination and its relationship to the BFOQ defense is explained *supra*, notes 28-32 and 37-40 and accompanying text.
290. *See* M. PLAYER, *supra* note 12, at 279, 282.

BFOQ defense presumes discriminatory conduct but attempts to justify it, business necessity arises at an earlier step as part of the process of determining whether conduct is discriminatory in the first place.

The challenged employment practice in a disparate impact case is facially neutral in that it does not differentiate on the basis of sex. Business necessity comes into play only if the practice has a disproportionate effect on members of one sex. As the *Griggs* Court explained, business necessity is the analytical "touchstone" for testing whether a facially neutral policy with a statistically imbalanced impact is discriminatory within the meaning of Title VII.[291] The role of business necessity, then, is to determine whether an otherwise nondiscriminatory policy serves a legitimate employment-related purpose so as to dissipate the inference of discrimination raised by virtue of the practice's disproportionate impact.[292]

This distinction is crucial. One theory justifies overt discrimination. The other theory assists in determining whether facially neutral policies have an unacceptable impact on members of one sex or are appropriately related to legitimate business purposes. Regardless of the labels attached to these theories, the former necessarily must be more circumscribed in scope.

Take, for example, the case of a firefighter position. The Fire Chief has a legitimate interest in filling the position with an employee who has the strength and endurance to perform essential fire fighting tasks. A classic case of disparate treatment occurs if the Chief presumes that women as a class are incapable of performing these duties and adopts a male-only hiring policy. On the other hand, the Chief may screen applicants by testing for strength and endurance. A prima facie case of disparate impact arises if this test disqualifies more women than men.

These two scenarios require two functionally different methods of analysis. The former exclusionary policy, based as it is on stereotyped characterizations, is clearly more offensive to the policies underlying Title VII.[293] The blanket exclusion of all women applicants, as a matter of policy, should be allowed only if absolutely necessary to the performance of essential job duties, *i.e.*, if the BFOQ test is established. The strength and endurance test, however, warrants a different approach. The test does not exclude women as a class. Even if the test operates so as to exclude a higher percentage of female applicants, this does not necessarily offend Title VII's goal of equal treatment.[294] The pertinent issue in this disparate impact context is whether the strength and endurance test is appropriately tailored to screen for necessary job skills. In other words, the

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291. *Griggs*, 401 U.S. at 432.

292. *See* Comment, *supra* note 41 at 933-34.

293. *See* Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977) (the explicit consideration of race, color, religion, sex, or national origin in making employment decisions "was the most obvious evil Congress had in mind when it enacted Title VII"); *see also* Note, *Discrimination Law—Impermissible Use of the Business Necessity Defense and the Occupational Qualification*, 12 W. NEW ENG. L. REV. 135, 162-63 (1990) (the greater culpability inherent in intentional as opposed to unintentional discrimination requires a narrower reading of the exception in the former context).

294. *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 265-81 (1971).

facially neutral test should be found discriminatory only if it fails the more lenient business necessity standard.

The Supreme Court has recognized this hierarchy of culpability with respect to disparate treatment and disparate impact claims in two recent decisions clarifying burden of proof rules. In *Price Waterhouse v. Hopkins*,[295] the Court addressed the burden of proof allocation in a mixed-motive, disparate treatment case. The plaintiff in such a case establishes a prima facie violation by showing that gender played a motivating part in an employment decision even though another, nondiscriminatory reason may also have been a factor.[296] The Court explained that the burden of proof then shifts to the employer to show that it would have reached the same decision in the absence of the discriminatory factor.[297]

In contrast, the Supreme Court in *Wards Cove Packing Co. v. Atonio*,[298] held that the burden of proof in a disparate impact case remains with the plaintiff at all times, including the business necessity stage. Even after a prima facie case has been established, the employer's burden is only that of producing evidence of a business justification to support the challenged practice.[299]

Justice O'Connor, in a concurring opinion in *Price Waterhouse*,[300] explained this distinction in burden of proof rules in terms of a "presumption of good faith."[301] Once overt discrimination is shown to exist, even in part, the employer is not "entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination."[302] In this setting, it is appropriate for the employer to convince the factfinder that "despite the smoke, there is no fire."[303] Directly comparing the two types of claims, Justice O'Connor stated:

> I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. First, the explicit consideration of race, color, religion, sex, or national origin in making employment decisions "was the most obvious evil Congress had in mind when it enacted Title VII. . . ." Second, shifting the burden of persuasion to the employer in a situation like this one creates no incentive to preferential treatment . . . the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.[304]

These burden of proof rules underscore yet another reason for not substituting a business necessity standard in disparate treatment cases. While a

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295. 109 S. Ct. 1775 (1989). The *Price Waterhouse* decision is discussed *supra* notes 30 and 35.

296. *Id.* at 1785.

297. *Id.* at 1787-88.

298. 109 S. Ct. 2115, 2126 (1989). The *Wards Cove* decision is discussed *supra* at notes 49-53 and accompanying text.

299. *Id.*

300. *Price Waterhouse*, 109 S. Ct. 1775, 1798-1801 (O'Connor, J., concurring).

301. *Id.*

302. *Id.* at 1798-99.

303. *Id.* at 1799.

304. *Id.* at 1803-04.

BFOQ is an affirmative defense that the employer must establish,[305] the *Wards Cove* decision places the burden of persuasion in disparate impact cases on the plaintiff.[306] The Seventh Circuit in *Johnson Controls* incorporated the *Wards Cove* burden of proof standard along with its use of the business necessity theory. Thus, the *Johnson Controls* court affirmed the grant of summary judgment for the employer because the *plaintiff* failed to prove that paternal exposure to lead can also pose a danger to offspring and that feasible alternatives exist to excluding fertile women from the workplace.[307] As Judge Easterbrook noted in dissent, this application of *Wards Cove* further waters down the already lenient approach of the *Wright* and *Hayes* courts, both of which had assumed that the employer at least bore the burden of establishing business necessity.[308] Unfortunately, the combination of substituting a business necessity test for the traditional BFOQ defense and placing the burden on the plaintiff to establish the lack of business necessity transforms a narrow exception to the ban on sex discrimination into a virtual, and contrary, presumption.

3. *Correcting the Course*

The substitution of a business necessity standard has also met with recent criticism from more official sources. Within the first ten months following the release of the *Johnson Controls* opinion, the EEOC and two court decisions took positions expressly disagreeing with the Seventh Circuit's approach.

The Seventh Circuit's use of the *Wards Cove* burden of proof rules has led the EEOC to issue a new Policy Guide disagreeing with the *Johnson Controls* decision.[309] In retreating from a previously issued interim Policy Statement that adhered to the *Wright-Hayes* business necessity analysis in fetal protection cases,[310] the EEOC stated:

> In its interim guidance, the Commission did not contemplate the Seventh Circuit's application of the *Wards Cove* business necessity standard, imposing on the plaintiff the burden of disproving business necessity. The court's approach represents a significant departure from the analytical framework previously developed by the courts and endorsed by the Commission. . . . For the plaintiff to bear the burden of proof in a case in which there is direct evidence of facially discriminatory policy is wholly inconsistent with settled Title VII law.[311]

The Policy Guide goes on to state that "[g]iven the Seventh Circuit's uncritical application of the *Wards Cove* adverse impact burdens to a factually distinct claim of facial discrimination, we now think BFOQ is the better approach."[312]

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305. *See supra* notes 37-40 and accompanying text.

306. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

307. UAW v. Johnson Controls, Inc., 886 F.2d 871, 889-92 (7th Cir. 1989).

308. *Id.* at 915 (Easterbrook, J., dissenting). It should be noted that both *Wright* and *Hayes* were decided prior to the Supreme Court's decision in *Wards Cove*.

309. EEOC Policy Guide N-915-047, 8 Fair Empl. Prac. Man. (BNA) 405:6797 (Jan. 24, 1990) (hereinafter "EEOC Policy Guide (1990)").

310. EEOC Policy Statement n.915.034, 1 EEOC Compl. Man. (CCH) N:3711 (Oct. 7, 1988) (policy Guidance on Reproductive and Fetal Hazards).

311. EEOC Policy Guide (1990), *supra* note 309, at 6799.

312. *Id.* at 6800.

The BFOQ standard endorsed by the EEOC more closely resembles that suggested by Judge Posner.[313] The EEOC Policy Guide states that the BFOQ defense in fetal protection cases may permissibly encompass concerns for the health of employee offspring, even if not directly related to job performance itself.[314] Nonetheless, the Policy Guide stresses that the application of the BFOQ defense must be quite narrow in scope. The Policy Guide explicitly directs field offices not to rely on *Johnson Controls* for guidance and criticizes that decision for giving "undue deference to the employer's judgment in broadly drawing its exclusionary policy."[315] The EEOC instead adopts the traditional three-prong BFOQ test with the employer bearing the burden of proof on each element.[316] The Policy Guide particularly emphasizes that an employer attempting to justify a fetal protection policy that excludes female employees must prove that it similarly protects the offspring of male employees from analogous risks and that its policy is as narrowly tailored as possible.[317]

A California court of appeals has also rejected the use of the business necessity standard in fetal protection cases. In *Johnson Controls II*,[318] the validity of Johnson Controls policy was again at issue, this time under California law. The California court affirmed the findings of the California Fair Employment and Housing Commission and invalidated the policy under a disparate treatment/BFOQ analysis. Although noting the similarities between Title VII and the applicable California statute,[319] the court rejected the Seventh Circuit's approach as an inappropriate "twist[ing]" of the requisite BFOQ standard.[320]

The California court initially explained that, a "possibility of pregnancy" criterion, as a basis for refusing to hire female employees, constitutes overt gender discrimination.[321] The court then carefully reviewed the "distinct conceptual bases" of the BFOQ and business necessity theories and held that the legality of overtly discriminatory practices must be scrutinized under a BFOQ standard.[322] The California court cautioned that:

> [t]he fact that it may be difficult for the employer to meet the BFOQ standard in an FPP situation is a concern of the Legislature. This court should not misconstrue the plain import of the law to solve a problem the legislative branch would have addressed if it were omniscient.[323]

The California court concluded that Johnson Controls failed to establish the elements of the BFOQ defense. The court held that the employer failed to show that fertile women cannot effectively perform the jobs in question, thereby adopting Judge Easterbrook's narrow construction of the "business essence" ele-

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313. *See Johnson Controls*, 886 F.2d at 903 (Posner, J., dissenting).
314. *See* EEOC Policy Guide (1990), *supra* note 309, at 6801.
315. *Id.* at 6803-04.
316. *Id.* at 6802.
317. *Id.* at 6801-02.
318. Johnson Controls, Inc. v. California Fair Employment and Hous. Comm'n, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990).
319. *Id.* at 539, 267 Cal. Rptr. at 170.
320. *Id.* at 546, 267 Cal. Rptr. at 174.
321. *Id.* at 533, 267 Cal. Rptr. at 166.
322. *See id.* at 540-41, 267 Cal. Rptr. at 170-71.
323. *Id.* at 544, 267 Cal. Rptr. at 173.

ment.[324] The court also ruled that Johnson Controls did not demonstrate that "all or substantially all" women workers posed a risk of potential fetal harm. The fact that some women may become pregnant, the court noted, does not justify the exclusion of female employees as a class.[325]

The court placed special emphasis on the fact that Johnson Controls' policy was in conflict with applicable OSHA regulations in two respects.[326] First, the threshold level of impermissible lead exposure is more stringent under the Johnson Controls' policy.[327] Second, and more significantly, the pertinent OSHA standard specifically rejects the need for treating male and female employees differently because of procreation concerns.[328] The court observed that OSHA findings reject the claim that lead poses a greater harm to the reproductive capacities of women than men.[329]

Most recently, the Sixth Circuit Court of Appeals also rejected the use of a business necessity standard in testing the validity of a fetal protection policy. In *Grant v. General Motors Corp.*,[330] a female employee at General Motors' Central Foundry facility in Ohio was reassigned to a lower paying job in accordance with the company's fetal protection policy. This policy bans all fertile women from jobs in foundry areas with air lead levels in excess of 30 micrograms of lead per cubic meter of air.[331] In resolving the employee's sex discrimination claim, the district court, as in *Johnson Controls*, treated the policy as facially neutral and applied a disparate impact mode of analysis.[332] Based on this standard, the district court upheld the policy as a matter of business necessity.[333]

The Sixth Circuit reversed and sharply criticized the *Johnson Controls* approach. The appellate court intially reviewed the impact of the Pregnancy Discrimination Act amendments and concluded that the General Motors policy, being premised on pregnancy-related distinctions, must be characterized as facially discriminatory under Title VII.[334] As such, the policy must be tested under a BFOQ standard: "We agree with the view of the dissenters in *Johnson Controls* that fetal protection policies perforce amount to overt sex discrimination, which cannot logically be recast as disparate impact and cannot be counte-

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324. *See id.* at 542, 267 Cal. Rptr. at 171.

325. *See id.* at 542, 548, 267 Cal. Rptr. at 171, 176.

326. *See id.* at 526-28, 267 Cal. Rptr. at 161-62.

327. The Johnson Controls' policy excludes women of childbearing capacity from jobs in which prior employees had recorded blood lead levels in excess of 30 ug/100 ml. *Id.* at 526, 267 Cal. Rptr. 161. The federal OSHA standard requires that workers be removed from worksites if their blood lead level equals or exceeds 50 ug/100 ml. *Id.* at 527, 267 Cal. Rptr. 162. The OSHA standard recommends that both males and females exposed to lead who plan to conceive should keep their blood lead levels below 30 ug/100 ml., but does not require their removal from the workplace. *Id.*

328. The OSHA lead standard itself does not establish any standard specific to women employees. The attachments to the standard's preamble states that "there is no basis in the record for preferential hiring of men over women in the lead standard, nor will this final standard create a basis for exclusion from work of any person, male or female, who is capable of procreating." *Id.* at 528, 267 Cal. Rptr. 162.

329. *Id.* at 536, 267 Cal. Rptr. 167.

330. 980 F.2d 1303 (6th Cir. 1990).

331. *Id.* at 1305. The General Motors' policy adopts the same lead level threshold as the Johnson Controls policy.

332. *See id.* at 1306.

333. *Id.*

334. *Id.* at 1307-10.

nanced without proof that infertility is a BFOQ."[335] Accordingly, the Sixth Circuit remanded the case for the purpose of allowing the employer to produce evidence justifying the policy as a BFOQ.[336]

4. *A BFOQ Proposal*

The Supreme Court has now accepted the *Johnson Controls* decision for review.[337] This provides the Court with an opportunity to clarify both the appropriate scope of the BFOQ defense generally and the specific application of the defense in fetal protection cases.

On the former issue, the Court should reaffirm the traditional scope of the BFOQ defense. The substitution of a business necessity standard is a very awkward fit in disparate treatment cases. Further, placing the burden of proof on the plaintiff to disprove business necessity, as did the *Johnson Controls* court, turns employment discrimination law on its head by making intentional discrimination presumptively lawful. Even if the Court should decide that fetal protection cases require a more lenient standard of the type adopted in *Johnson Controls*, it should make clear that this standard is neither applicable nor appropriate in the broader context of Title VII.[338]

The *Johnson Controls* approach evokes more sympathy when the focus narrows to fetal protection cases. The theme running throughout the three expansionary fetal protection cases is that fetal health is too important to be endangered by the "rigid application of proof patterns."[339] The traditional BFOQ standard, the argument continues, does not adequately value an employer's legitimate concern for the health of employee offspring because it focuses too narrowly on characteristics affecting job performance.[340] Put less idealistically, the traditional BFOQ standard does not protect an employer against the potential for huge monetary liability resulting from fetal damage.

Even in this narrower context, however, the Court should reject the *Johnson Controls* approach for at least three reasons. First, the fetal protection policy sustained in *Johnson Controls* sweeps too broadly. The Johnson Controls policy presumes that all fertile women will bear children and that the rights of the potential offspring automatically outweigh the rights of the potential female

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335. *Id.* at 1310.

336. *Id.* at 1311. The BFOQ defense envisioned by the Sixth Circuit is similar to that of Judge Posner's dissent in *Johnson Controls*. *See Johnson Controls*, 886 F.2d at 904 (Posner, J., dissenting). Both opinions interpret the BFOQ defense as appropriately considering workplace hazards that may potentially endanger employee offspring even if those hazards would not interfere with job performance itself. *See Grant*, 908 F.2d at 1311.

337. UAW v. Johnson Controls, Inc., 110 S. Ct. 1522 (1990).

338. It is important for the Court to clarify the reach of its holding since both the *Wright* and *Johnson Controls* decisions can be read as inviting the use of a business necessity standard in other types of Title VII cases. In *Wright*, for example, the Fourth Circuit suggests that the employer can select whether to assert a BFOQ or a business necessity defense as a matter of litigation strategy. Wright v. Olin Corp., 697 F.2d 1172, 1185-86, n.21 (1982). In *Johnson Controls*, the Ninth Circuit warns against the rigid application of proof patterns. UAW v. Johnson Controls, Inc., 886 F.2d 871, 883 (1989). At a minimum, the Court should limit any expansion of the defense standard to a sui generis exception applicable because of the unique considerations posed by fetal protection policies.

339. *See, e.g.*, *Johnson Controls*, 886 F.2d at 883.

340. *See, e.g.*, *Wright*, 697 F.2d at 1185-86, n.21.

workers.[341] The policy excludes all fertile women even though only a small fraction will actually become pregnant on the job if hired.[342] In addition, most of these pregnancies will result in the delivery of healthy children.[343]

The *Johnson Controls* policy also is too broad because of the court's failure to address the possibility of less discriminatory alternatives.[344] The most obvious alternative is to provide female applicants with informed warnings of the potential for fetal harm that may result from lead exposure.[345] At a minimum, such warnings will likely reduce the number of hazardous pregnancies in a voluntary, self-selecting manner.[346] An informed warning alternative is also consistent with the societal norm recognizing the mother's primary responsibility for making decisions concerning the health of the fetus she is carrying.[347] Other alternatives, including the possible use of respirators, selective work assignments, and early pregnancy detection programs, also deserve consideration.

At the same time, the *Johnson Controls* policy is also too narrow in that it focuses on health risks resulting from working mothers but not working fathers. The *Johnson Controls* court discounted evidence of reproductive and offspring health dangers through paternal exposure largely on burden of proof grounds.[348] When the burden was appropriately placed on the employer in *Johnson Controls II*, that court concurred with OSHA in finding that the impact of lead exposure on employee offspring was similar for both sexes.[349]

By excluding from the workplace all fertile women, but only fertile women, the *Johnson Controls* policy is all too reminiscent of the sex-specific protective

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341. *See* Comment, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755, 756 (1985) (these policies presume that women employees are "ready, willing and able to procreate. Sexual activity or celibacy, marital status, use of contraception, and a person's announced intention not to parent" are irrelevant).

342. Becker, *supra* note 121, at 1232-33. The author compiles data indicating some interesting statistics. Approximately 9% of all fertile women become pregnant each year, but this percentage varies by age, occupation and status. For example, the birth rate for blue-collar women over 30, the prime applicant pool for lead exposure jobs, is only about 2%. One would assume that the rate of pregnancy would decline even further among women who are informed of the dangers to fetal health resulting from lead exposure.

343. *See Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting).

344. The Seventh Circuit disposed of this element by noting that the plaintiff had not carried its burden of proving the existence of less discriminatory alternatives. *Id.* at 890-93. Once again, this illustrates the court's error in borrowing the burden of proof rules normally applicable in cases of disparate impact. The employer is in a far better position to produce evidence concerning the possible alternatives that it considered and rejected before adopting the sex-based employment policy.

345. A number of states have enacted "right-to-know" laws that require employers to provide information and training to employees concerning the dangers posed by working with hazardous substances to which they are routinely exposed. *See, e.g.*, Minn. Stat. § 182.65 (1988).

346. *See* Becker, *supra* note 121, at 1242. *See also Johnson Controls*, 886 F.2d at 907 (Posner, J., dissenting) ("The plaintiffs believe that a real 'scare' warning would have deterred these eight pregnancies [that occurred before the fetal protection policy was adopted]; maybe they are right.").

347. *See* Becker, *supra* note 121, at 1242 ("The risks associated with decisions to smoke or drink during pregnancy seem less likely to benefit living and potential children than the risks associated with employment.").

348. *Johnson Controls*, 886 F.2d at 889-90 ("[T]he UAW has failed to present facts sufficient to carry its burden of demonstrating the absence . . . of the risk of transmitting lead exposure to unborn children only through females.").

349. Johnson Controls, Inc. v. California Fair Employment and Hous. Comm'n, 218 Cal. App. 3d 517, 536-39, 267 Cal. Rptr. 158, 167-69 (1990). *See also* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 655-65 (1981) (reviews scientific evidence and concludes that it is unwarranted, in most instances, to assume that reproductive hazards resulting from workplace exposure to toxic substances occurs only through women workers).

laws that predated Title VII. One commentator, after a thoughtful review of the policy underpinnings of these respective measures, concluded that:

> Each of the troubling aspects of sex-specific protectionist legislation recurs in the contemporary debate over fetal vulnerability policies: the refusal to consider the effects of policies on women, the identification of women with (and only with) reproductive functions, the willingness to limit women's employment opportunities without evidence that women's employment poses real risks to others, the exclusion only of women perceived as marginal workers, and the assumption that women are not competent decision makers.[350]

One of Title VII's earliest impacts was to preempt state laws that excluded women from employment because of their child-bearing capabilities.[351] Such laws, the Supreme Court once noted, "put women, not on a pedestal, but in a cage."[352] Title VII replaced the romantic paternalism of these laws with a mandate for equal treatment. The resurrection of similar stereotyping assumptions in the guise of a business necessity justification for discrimination is an unfortunate step backwards in Title VII jurisprudence.

A further problem with creating an exception under Title VII for fetal protection cases is the inappropriateness of using Title VII as a vehicle for implementing workplace safety policies. The purpose of Title VII is to eliminate discrimination, not to regulate workplace safety. Congress created a separate federal statutory scheme—the Occupational Safety and Health Act[353]—to further this latter goal.

Fetal protection policies require an accommodation between these two statutory enactments and their respective goals of curbing discrimination and ensuring a safe work environment. Unfortunately, the *Johnson Controls* decision fails in this task. The *Johnson Controls* court sustained a sex-based employment practice for the purpose of implementing a safety policy that exceeds and arguably conflicts with pertinent OSHA requirements.[354]

An appropriate accommodation of these competing policies is to leave the issue of workplace safety to the agency created for that purpose—OSHA. If OSHA standards necessitate a sex-based hiring policy to implement the goal of a safe work environment, then the strictures of Title VII should give way unless a less discriminatory alternative is feasible. On the other hand, the anti-discrimination goal of Title VII should prevail when a safety policy exceeds or conflicts with OSHA requirements. This formula is preferable to that of *Johnson Con-*

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350. Becker, *supra* note 121, at 1229. Similar concerns were expressed in Williams, *supra* note 349, at 654-55.

351. *See supra* notes 23-26 and accompanying text.

352. Frontiero v. Richardson, 411 U.S. 677, 684 (1973) ("[O]ur Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of romantic paternalism which, in practical effect, put women, not on a pedestal, but in a cage.").

353. 29 U.S.C. § 651 (1988). The Act is administered by the Occupational Safety and Health Administration (OSHA) which is empowered to adopt standards "reasonably necessary or appropriate to provide safe or healthful employment or places of employment." 29 U.S.C. § 652(8) (1988).

354. A comparison of the *Johnson Controls* policy and OSHA regulations is discussed *supra*, notes 326-29 and accompanying text.

trols which leaves both issues to the ad hoc discretion of individual employers.[355]

Thus, the *Johnson Controls* expansion of the BFOQ defense goes too far even in the specific context of fetal protection policies. The Supreme Court should use the *Johnson Controls* appeal to reaffirm the appropriateness of the traditional BFOQ defense in cases of intentional discrimination, including fetal protection cases, with the employer bearing the burden of establishing its need for the otherwise discriminatory practice.

Admittedly, this approach will not assuage employer concerns over potential liability if OSHA standards prove too lenient. Even informed, signed waivers by female employees will not bar their offsprings' right to sue the employer for prenatal injury.[356] But, equality is not always the most cost efficient alternative. Perhaps the real benefit of retaining a traditional BFOQ standard is that this approach will provide employers with the necessary incentive to make the workplace safe for all employees as opposed to adopting policies that simply exclude women workers without changing the work environment.[357]

IV. CONCLUSION

The five court of appeals decisions reviewed in this article have significantly expanded upon the traditional scope of the BFOQ defense to intentional discrimination. The *Torres* case does so by adjusting the existing BFOQ test to increase the extent of judicial deference to managerial decision-making. The remaining four decisions accomplish a similar expansion by substituting the more lenient business necessity standard usually applicable only in disparate impact cases. Regardless of the analytical methodology, each of these cases has the practical effect of upholding a sex-based employment practice that would be of questionable validity under a traditional BFOQ model.

This expansion has been invoked for a familiar purpose. All five of these cases sustain practices that provide special protection with respect to women. The role-model cases shield women from negative psychological influences. The fetal protection cases shield the potential offspring of women from workplace health hazards. Although these specific goals may be laudatory in another context, this pedestal is once again a cage in reality.

In his dissenting opinion in *Johnson Controls*, Judge Posner stated that "a narrow reading [of the BFOQ exception] is . . . inevitable. A broad reading would gut the statute."[358] These five decisions threaten this notion of inevitability. The use of a business necessity test in the context of disparate treatment

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355. Since the *Johnson Controls* court placed the burden of disproving business necessity on the plaintiff, UAW v. Johnson Controls, Inc., 886 F.2d 871, 887-88 (1989), it is conceivable that individual employers can adopt a wide variety of fetal protection policies, any of which can support the exclusion of female employees.

356. While a female employee could waive her own cause of action under appropriate circumstances, an agreement to waive a cause of action belonging to her child would be illegal and unenforceable. *See* Williams, *supra* note 349, at 646. Some commentators suggest that Congress should consider a legislative solution that not only bans sex-based exclusionary policies, but also limits potential tort awards. *See* Becker, *supra* note 121, at 1246, 1264; Comment, *supra* note 251, at 982.

357. *See* Buss, *supra* note 131, at 590-91.

358. *Johnson Controls*, 886 F.2d at 903 (Posner, J., dissenting).

considerably increases the breadth of the exception. Placing the burden on the plaintiff to disprove business necessity, as the *Johnson Controls* decision does, further transforms this broader exception into a presumption. The gutting process may now be at hand for the once narrow BFOQ defense to Title VII's ban on intentional discrimination.

ADDENDUM

The Supreme Court decided the *Johnson Controls* appeal on March 20, 1991.[1] The Court, not surprisingly, reversed the Seventh Circuit and its reliance on the business necessity standard. More surprisingly, the Seventh Circuit's business necessity approach failed to garner even one vote, and even the broad-based BFOQ urged by Judge Posner fell short of majority support. The Court, instead, predicated its decision on a very narrow reading of the BFOQ defense that parallels closely the recommendations of my article. Hopefully, this narrow reading will stem the recent and inappropriate expansion of the BFOQ defense.

I. THE SUPREME COURT'S DECISION

The justices authored three separate opinions in deciding *Johnson Controls*. All of the justices agreed that Johnson Controls' fetal protection policy was facially discriminatory. The point of divergence concerned the proper scope of the BFOQ defense. The majority opinion, written by Justice Blackmun, adhered to the traditional narrow interpretation of the BFOQ defense.[2] Justice White, joined by the Chief Justice and Justice Kennedy, authored a concurring opinion that advocated a more expansive interpretation.[3] Finally, Justice Scalia delivered a separate concurrence that, on the BFOQ issue at least, adopted a construction similar to that of Justice White.[4]

The Court had little difficulty in unanimously concluding that the Johnson Controls policy constituted disparate treatment discrimination. Expressly disagreeing with the disparate impact approach utilized by the courts of appeal in the *Wright*, *Hayes*, and *Johnson Controls* cases,[5] the Court found the policy facially discriminatory even without reference to the Pregnancy Discrimination Act.[6] The Court explained that the policy classifies on the basis of gender, rather than fertility alone, since it excludes only fertile women and not fertile men from the workplace.[7] The Pregnancy Discrimination Act "bolsters" this conclusion by making classifications based on pregnancy explicit sex discrimination for the purposes of Title VII.[8]

This unanimity disappeared, however, once the Court turned its attention to the BFOQ issue. The majority opinion adopted a narrow construction of the BFOQ defense similar to that described in Judge Easterbrook's dissent below.[9]

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1. UAW v. Johnson Controls, Inc., 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215).

2. *Id.* In addition to Justice Blackmun, Justices Marshall, Stevens, O'Connor and Souter joined in the majority opinion.

3. *Johnson Controls*, 59 U.S.L.W. at 4215 (White, J., concurring).

4. *Id.* at 4218 (Scalia, J., concurring).

5. These three decisions are discussed *supra* at notes 213-79 and accompanying text.

6. *Johnson Controls*, 59 U.S.L.W. 4209, 4211-12.

7. *Id.*

8. *Id.* at 4212.

9. UAW v. Johnson Controls, Inc., 886 F.2d 871, 908 (7th Cir. 1989) (Easterbrook, J., dissenting), *rev'd* 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215). Judge Easterbrook's dissenting opinion is discussed *supra* at notes 275-76 and accompanying text.

After reviewing the statutory language[10] and those cases recognizing a safety-based BFOQ,[11] the majority endorsed the traditional view that a BFOQ "is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."[12] Justice Blackmun also found support for this approach in the Pregnancy Discrimination Act which, he concluded, contains a similar BFOQ standard of its own. That is, the PDA mandates that pregnant employees be "treated the same" as other employees unless the pregnant employees differ "in their ability or inability to work."[13]

The majority opinion concluded that Johnson Controls could not establish a BFOQ for its fetal protection policy under this standard. An employee's ability to perform the job, Justice Blackmun explained, must be scrutinized with reference to the "essence" of the employer's business.[14] Applying a narrow focus to the "business essence" prong of the BFOQ test,[15] the majority described the essence of Johnson Controls' business as "batterymaking." Johnson Controls' concern for the welfare of future children, no matter how laudable, is simply not a part of the "essence" of its business.[16] Accordingly, the asserted BFOQ must fail because "[f]ertile women . . . participate in the manufacture of batteries as efficiently as anyone else."[17]

In contrast, the concurring opinion of Justice White interpreted the BFOQ defense more expansively. Based upon reasoning similar to Judge Posner's dissent in the Seventh Circuit *Johnson Controls* decision,[18] the White concurrence argued that "the defense is broad enough to include considerations of cost and safety of the sort that could form the basis for an employer's adoption of a fetal protection policy."[19] In effect, this concurring opinion interpreted the business essence of Johnson Controls broadly so as to encompass not just batterymaking, but the making of batteries in a manner that protects fetal safety and avoids substantial tort liability.[20] To Justice White, the essence of a business does not stop at mere job performance, but includes reasonable efforts to protect the

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10. The majority opinion states that the use of the term "occupational" in the statutory definition of the BFOQ defense indicates that the necessity for a policy of gender bias must "concern job-related skills and aptitudes." *See Johnson Controls*, 59 U.S.L.W. at 4212.

11. These cases are discussed *supra* at notes 121-33 and accompanying text.

12. *Johnson Controls*, 59 U.S.L.W. at 4213.

13. *See id.* at 4213, quoting language from the Pregnancy Discrimintion Act amendments to Title VII, codified at 20 U.S.C. § 2000e(k). The concurring opinion of Justice White disagrees and asserts that the Pregnancy Discrimination Act "did not purport to eliminate or alter the BFOQ defense." *Johnson Controls*, 59 U.S.L.W. at 4217 (White, J., concurring).

14. *Johnson Controls*, 59 U.S.L.W. at 4213-14.

15. The "business essence" element of the BFOQ test is discussed *supra* at notes 77-92 and accompanying text.

16. *Johnson Controls*, 59 U.S.L.W. at 4213-14. The majority opinion goes on to state that "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire their parents." *Id.* at 4214.

17. *Id.* at 4214.

18. UAW v. Johnson Controls, Inc., 886 F.2d 871, 904 (7th Cir. 1989) (Posner, J., dissenting), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215). Judge Posner's dissenting opinion is discussed *supra* at notes 277-79 and accompanying text.

19. *Johnson Controls*, 59 U.S.L.W. at 4216 (White, J., concurring).

20. *See id.* at 4215-17.

safety of third parties (such as future offspring) endangered by that job performance.[21]

Justice Scalia also took issue with the majority for rejecting any cost-based defense short of that threatening the actual survival of the enterprise.[22] He suggested, instead, that a BFOQ is appropriate for situations in which a nonexclusive gender policy would be technically feasible but "inordinately expensive."[23]

The opinions also disagreed about the likelihood of an employer such as Johnson Controls incurring substantial tort liability in the absence of an exclusionary fetal protection policy. The majority stated that the potential for liability is remote where the employer complies with applicable OSHA regulations and warns employees of the dangers arising from lead exposure.[24] In addition, the majority suggested, although without deciding, that compliance with Title VII may preempt liability under state tort laws.[25]

The concurring opinions appear justified in their skepticism of the majority's assessment of the potential for damages.[26] As discussed in my article, employee warnings and compliance with OSHA requirements likely will not be sufficient to insulate an employer from potential liability to injured offspring.[27] Moreover, Justice Scalia is correct in pointing out that preemption only results when compliance with Title VII requires a violation of state tort law.[28] In the fetal protection context, it appears possible for an employer to avoid such a conflict by providing a safe workplace for both sexes.

In spite of these disagreements, both concurring opinions joined in the Court's judgment reversing the Seventh Circuit. Justice Scalia, although diverging from the majority on the appropriateness of a cost-based defense, nevertheless concurred on the grounds that Johnson Controls did not, in fact, assert a cost-based BFOQ in this case.[29]

Justice White concurred for a different reason—the Seventh Circuit's mishandling of the burden of proof issue. As Justice White noted, the lower courts' resolution of this case by summary judgment leaves the record devoid of evidence on a number of important issues, including the potential for injury to offspring resulting from lead exposure to male workers.[30] The Seventh Circuit

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21. *Id.* at 4217, n.5.

22. With respect to the asserted cost defense, the majority opinion concluded as follows: "We, of course are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them." *Id.* at 4215.

23. *Id.* at 4218-19 (Scalia, J., concurring).

24. *Id.* at 4214.

25. *Id.* at 4214-15.

26. *Id.* at 4216 (White, J., concurring) and at 4218 (Scalia, J., concurring).

27. *See supra* note 356 and accompanying text.

28. *See* 59 U.S.L.W. at 4218 (Scalia, J., concurring). *See generally* California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 290-92 (1987) (Title VII does not preempt state statute if employer can tailor its employment practices to comply with both laws).

29. *See Johnson Controls*, 59 U.S.L.W. at 4219 (Scalia, J., concurring).

30. *Id.* at 4218. Justice Scalia contended that the issue of male exposure is irrelevant because it only pertains to determining whether the Johnson Controls policy is facially discriminatory, which is an issue already answered in the affirmative by the terms of the Pregnancy Discrimination Act. *Id.* Justice White's concurrence, however, apparently agrees with Judge Posner that the male exposure issue also is relevant to the BFOQ analysis in that "if that hazard is significant the fact that Johnson Controls does nothing about it undermines the company's argu-

was able to affirm the grant of summary judgment for the employer in this context primarily by adopting a business necessity approach and placing the burden of proof as to this issue on the plaintiff. Thus, the Seventh Circuit concluded that summary judgment was appropriate because the plaintiffs had failed to produce evidence sufficient to disprove the asserted business necessity defense.[31] Justice White's concurrence joined with the majority in requiring a BFOQ mode of analysis under which the employer bears the burden of proving the existence of a BFOQ defense.[32] Under this approach, Justice White concluded that the grant of summary judgment was inappropriate and that a trial on the merits should result.[33]

II. THE BFOQ DEFENSE AFTER JOHNSON CONTROLS

The *Johnson Controls* majority reaffirms the BFOQ defense as a very limited exception to Title VII's ban on overt discrimination. The majority adopts a construction consistent with both the traditionally narrow scope of the BFOQ defense and the recommendations of my article. The decision not only halts the recent expansion of the BFOQ exception, but appears to signal a major reversal in that process as well.

The majority accomplishes this reversal by rejecting many of the core expansionary principles underlying the five appellate court decisions discussed in my article. First of all, the Court reaffirms that cases of disparate treatment are to be analyzed with reference to the BFOQ defense rather than the business necessity defense. Interestingly, this conclusion is unstated. The majority simply finds facial discrimination and then proceeds to the BFOQ inquiry.[34] None of the three opinions even mention the possibility of an alternative business necessity approach. Conceivably, this silence could be interpreted as not foreclosing the possibility of a business necessity approach in another disparate treatment context. The unquestioned application of the traditional disparate treatment/BFOQ equation, however, makes this unlikely.

Secondly, the Court places the BFOQ burden of proof on the employer as opposed to the Seventh Circuit's determination that it is up to the plaintiff to disprove the existence of business necessity. This conclusion flows naturally from the rejection of the business necessity standard. No court, not even the Seventh Circuit, has suggested shifting the burden of proof on the BFOQ issue. Again, the majority simply applies the traditional burden of proof rules without discussion.[35] The concurring opinion of Justice White, however, expressly rejected the Seventh Circuit's allocation of the evidentiary burden.[36]

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ment that its fetal protection policy is motivated by concern for the fetus and reasonably necessary to the operation of the battery business." UAW v. Johnson Controls, Inc., 886 F.2d 904, 907 (7th Cir. 1989) (Posner, J., dissenting), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215).

31. *See id.* at 886 F.2d 871, 883-93. The Seventh Circuit's use of a business necessity standard is criticized, *supra*, at notes 280-308 and accompanying text.

32. *Johnson Controls*, 59 U.S.L.W. at 4218 (White, J., concurring).

33. *Id.*

34. *See id.* at 4212.

35. *See id.* at 4214.

36. *See id.* at 4218 (White, J., concurring).

These two conclusions, alone, would support a reversal of the Seventh Circuit's decision in *Johnson Controls*. The Supreme Court went further, however, and described a very strict test for the BFOQ exception.

Of particular significance, the majority opinion rejected a broad construction of the "business essence" element of the BFOQ test. The Seventh Circuit, in the *Torres* and *Johnson Controls* decisions, interpreted the employer's business mission broadly in sustaining exclusionary employment practices. In *Torres*, the business essence of a women's prison included not just prison security, but also a rehabilitative environment free of any male presence.[37] Similarly, Johnson Controls did not just make batteries, it made batteries without adverse fetal safety or cost consequences.[38] Justice White's concurrence endorsed this more liberal reading of the business essence element,[39] but Justice Blackmun disagreed. The business essence element, according to the majority opinion, properly focuses on the "central purpose of the enterprise" and the "core of the employee's job performance."[40] A safety-based BFOQ, therefore, is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job.[41] Similarly, the majority opinion severely limited the potential for a BFOQ premised on cost considerations noting that, at least short of a financial situation that threatens the survival of the business enterprise itself, an employer cannot justify discrimination because of the "incremental cost of hiring women."[42]

The majority's narrow reading of the "business essence" element is the correct one. As discussed in my article, a broad essence factor affords employers too much of an opportunity to justify exclusionary practices by defining its own business mission in convenient detail.[43]

The Court's opinion also retains a strict interpretation of the "all or substantially all" factor. The appellate court decisions in *Chambers* and *Torres* virtually dispensed with this factor by deferring broadly to the employer's own assessment as to the need for a sex-specific policy.[44] In *Johnson Controls*, however, both Justice Blackmun and Justice White agreed that this element of the BFOQ test must be construed as a limitation on sex-specific employment practices.[45] Justice Blackmun pointed out that few women in high risk positions at

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37. *See* Torres v. Wisconsin Dep't of Health and Social Servs., 859 F.2d 1523, 1529-30 (7th Cir. 1988). The *Torres* decision is discussed *supra* at notes 156-67 and accompanying text.

38. *See* UAW v. Johnson Controls, Inc., 886 F.2d 871, 895-96 (7th Cir. 1989), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) (No. 89-1215).

39. *See Johnson Controls*, 59 U.S.L.W. at 4216-17 (White, J., concurring).

40. *Id.* at 4213.

41. *Id.* Justice Blackmun rejected the concurrence's argument that fetal safety is part of the employer's business mission by stating that the "unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of batterymaking." *Id.*

42. *Id.* at 4215. The opinions of both Justice White, *id.* at 4216-17, and Justice Scalia, *id.* at 4218, disagree with this strict limitation on the possibility of a cost-based BFOQ.

43. *See supra* notes 173-74 and accompanying text.

44. *See supra* notes 175-87 and accompanying text.

45. Justice Scalia declined to address this factor, finding it "irrelevant" given the mandate of the Pregnancy Discrimination Act. *See Johnson Controls*, 59 U.S.L.W. at 4218 (Scalia, J., concurring). The majority opinion did discuss the "all or substantially all" element but acknowledged that it "is somewhat academic in light of our conclusion that the company may not exclude fertile women at all." *Id.* at 4214. In contrast, Justice White's

Johnson Controls will become pregnant on the job and substantially fewer yet will bear injured children.[46] Justice White agreed that the Johnson Controls policy "reaches too far."[47] The majority opinion concluded that "Johnson Controls' fear of prenatal injury, no matter how sincere, does not begin to show that substantially all of its fertile women employees are incapable of doing their jobs."[48]

In spite of the *Johnson Controls* decision, the potential for a future return to the expansionary viewpoints of the five appellate court decisions discussed in my article should not be dismissed entirely. For one thing, the *Johnson Controls* Court did not address all of the arguments relied upon in the expansionary cases. The Court, for example, was not required to address the issue of whether a BFOQ determination requires the support of expert or objective evidence of some kind.[49] More significantly, the majority's narrow construction won the support of only five justices. The appointment of a more conservative jurist than Justice Souter, for whom the oral arguments in *Johnson Controls* were his first as a sitting member of the Court, may well have led to a very different formulation of the BFOQ test.

Nonetheless, the *Johnson Controls* decision is a stunning reaffirmance of a narrow BFOQ standard. The majority opinion is significant in this regard for its tenor as well as its doctrinal pronouncements. At the conclusion of his opinion, Justice Blackmun compares the Johnson Controls policy with the sex-specific protectionist legislation criticized in my article[50] because of its similar function as an excuse for gender inequality. Justice Blackmun condemns both sources of gender-based protectionism by stating: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[51] For the time being, at least, the Supreme Court in *Johnson Controls* has halted the expansion of the BFOQ defense.

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opinion, having rejected the majority's narrow construction of "business essence," found this element determinative. *See id.* at 4218 (White, J., concurring). Justice White also invoked the third element of the BFOQ test by explaining that the Court must consider the viability of alternative practices, including a comparison of the manner in which the employer responds to other risks, before sustaining a gender-based exclusion. *See id.*, n.10. For a discussion of the "less discriminatory alternative" element of the BFOQ test, *see supra* notes 102-06 and accompanying text.

46. *Johnson Controls*, 59 U.S.L.W. at 4214.

47. *Id.* at 4218 (White, J., concurring).

48. *Id.* at 4214.

49. *See supra* notes 175-87 and accompanying text.

50. *See supra* notes 24-26, 350-52 and accompanying text.

51. *Johnson Controls*, 59 U.S.L.W. at 4215.